90-26

Supreme Court, U.S.
FILED
JUL 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-3006, 88-3244

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation; and GLEN THEATRE, INC., an Indiana Corporation, GAYLE SUTRO, and CARLA JOHNSON,

Plaintiffs-Appellants,

v.

CIVIL CITY OF SOUTH BEND, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
Nos. 85 C 598 & 85 C 353—**Allen Sharp**, *Chief Judge.*

ARGUED MAY 25, 1989—
REARGUED *EN BANC* JANUARY 31, 1990—
DECIDED MAY 24, 1990

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge*, joined by BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER and RIPPLE, *Circuit Judges.* In this case we are asked to reconsider our unanimous decision in *Miller v. City of South Bend*, 887 F.2d 826 (7th Cir. 1989) in which we held that Indiana's Public Indecency statute, IND. CODE 35-45-4-1, was

unconstitutional as applied because non-obscene barroom variety nude dancing performed as entertainment is expression and, as such, is entitled to limited protection under the first amendment. That opinion was subsequently vacated based on a majority vote by the judges of this Court and we reheard oral argument *en banc* on January 31, 1990.

The extensive substantive and procedural history of this case is adequately discussed in our vacated opinion and we need not repeat ourselves here. *See Miller*, 887 F.2d at 829. The underlying facts of this matter are uncontested. Plaintiff J.R.'s Kitty Kat Lounge is a drinking establishment located in the City of South Bend that prior to the enactment of the ordinance in question provided nude dancing as entertainment for their patrons. Plaintiff Glen Theatre, an establishment which does not serve alcoholic beverages, similarly provided nude dancing as entertainment. Plaintiffs Darlene Miller, Gayle Sutro and Carla Johnson are dancers who wish to engage in such activity. The plaintiffs, in two separate actions that were consolidated on appeal, filed suits in the district court to enjoin the State of Indiana from enforcing its public indecency law to prevent them from presenting nude and semi-nude barroom dancing. The statute, IND. CODE 35-45-4-1, on its face provides for a total ban on nudity in public places. Violation of the statute is a Class A Misdemeanor. It broadly defines nudity as "the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state."[1] Obviously, the activity the plaintiffs seek to engage in falls within this definition.

[1] IND. CODE 35-45-4-1 provides in full:

Public Indecency

Section 1. (a) A person who knowingly or intentionally, in a public place:

(Footnote continued on following page)

We stress from the outset the limited scope of our inquiry today. This case does not concern obscenity, as the State has conceded that the dancing involved is non-obscene. It also does not concern whether these establishments are "public places" under the statute; the plaintiffs acknowledge that they are. *See State v. Baysinger*, 397 N.E.2d 580, 583 (Ind. 1980). And we are not concerned with any alleged overbreadth problems; that issue has already been resolved by this Court. *See Glen Theatre v. Pearson*, 802 F.2d 287 (7th Cir. 1987). Rather, the issue presented for this Court is a narrow one: whether non-obscene nude dancing of the barroom variety, performed as entertainment, is expression and thus entitled to protection under the first amendment.[2] Our analysis of the first amendment, based upon Supreme Court teachings and prior lower federal court decisions, directs us to the conclusion that such expression is entitled to limited protection and thus the statute is unconstitutional as applied.

I.

In addressing the issue before us, we recognize that we are not writing on a clean slate. While yet to delineate the precise scope of the protection afforded nude dancing, the Supreme Court, along with several circuit and district courts, has repeatedly and consistently intimated

[1] *continued*

(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity; or
(4) fondles the genitals of himself or another person;

commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

[2] Throughout this opinion, we use the general term "nude dancing" to refer specifically to non-obscene nude dancing of the barroom variety performed as entertainment.

that nude dancing performed as entertainment is protected activity under the first amendment. The Court first addressed the issue of first amendment protections for adult entertainment in *California v. LaRue*, 409 U.S. 109 (1972), where local bar owners sought a declaratory judgment that regulations promulgated by California's Department of Alcohol Beverage Control regulating the type of entertainment that could be presented in nightclubs or bars were unconstitutional because they abridged the freedom of expression guaranteed by the first and fourteenth amendments. The regulations in question "provided that liquor by the drink shall not be served in places where certain grossly sexual exhibitions are performed." *Id.* at 119 (Stewart, J., concurring). Reviewing the legislative history, the Court observed that the regulations were aimed at "bacchanalian revelries" that went far beyond simple nude dancing and entered the realm of obscenity. Overturning the district court's grant of the declaratory judgment, the Court held that the State was empowered under the twenty-first amendment to regulate such entertainment in establishments that serve liquor. In so holding, the Court recognized that "some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression . . ." *Id.* at 118. The Court was unanimous in agreement regarding this principle. The dissent by Justice Brennan found that the regulation "clearly applies to some speech protected by the First Amendment . . ." *Id.* at 123 (Brennan, J., dissenting). In a separate dissent, Justice Marshall noted evidence that the regulations may have been enacted for the "specific purpose of evading" the standards imposed on obscenity laws and that "the Government may suppress expression treating with sex only if it meets the three-pronged *Roth-Memoirs* [obscenity] test." *Id.* at 139 (Marshall, J., dissenting).

In the next case before the Court involving nude dancing, the justices strengthened their apparent recognition that the activity may be protected expression. In *Doran v. Salem Inn*, owners of three topless bars sought a temporary injunction against a Northhampton, New York, town ordinance which prohibited topless dancing in "[a]ny public place." 422 U.S. 922 (1974). The Court, per Justice Rehnquist, declared that "[a]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized [in *LaRue*] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances." *Id.* at 932. The Court upheld the grant of a preliminary injunction on the grounds that, unlike the ordinance in *LaRue*, the ordinance was overbroad because it applied to all commercial establishments and thus was not justifiable under the twenty-first amendment.

The Court reached differing conclusions in *LaRue* and *Doran* concerning statutes regulating adult entertainment. In doing so, it drew a distinction between an establishment which serves alcohol and one which does not. The ordinance in *LaRue* was upheld because it was within the confines of the state's power under the twenty-first amendment whereas the ordinance in *Doran* was not. These two cases can be reconciled only on the implicit assumption that the regulated activity, topless dancing, was protected by the first amendment. Otherwise, the state's police power would be sufficient to support the statutes in both cases. This implicit assumption was made explicit in the Court's next encounter with nude dancing, *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981).

In *Schad*, the Court addressed a city zoning ordinance that prohibited all live entertainment. The defendants, operators of an adult bookstore, were convicted of violating the ordinance by offering to its customers the opportunity to view a live nude dancer. The Court overturned the convictions finding that the ordinance, by restricting all forms of live entertainment, was overbroad and thus violative of the first and fourteenth amendments.

The Court began its analysis by discussing the scope of the broadly drafted city ordinance: "Here the Borough totally excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the

First Amendment." *Id.* at 68. From this starting point, the Court went on to discuss the protections afforded nude dancing under the first amendment. It noted that "[n]udity alone does not place otherwise protected material outside the mantle of the first amendment." *Schad*, 452 U.S. at 66 (citation omitted). The Court went on to state that "[n]or may an entertainment program be prohibited solely because it displays the nude human figure . . ." Based on these principles the Court concluded "*nude dancing is not without its First Amendment protections from official regulations.*" *Id.* (citations omitted) (emphasis added). The Court, while finding it unnecessary to define precisely the scope of the protection afforded the activity, unmistakably recognized that in some circumstances it falls within the ambit of the first amendment.

The majority's position on nude dancing in *Schad* was accepted by the entire Court. Chief Justice Burger, joined by Justice Rehnquist, dissented on the overbreadth issue but accepted the majority's view on nude dancing. The Chief Justice concluded that "the fact that a form of expression [nude dancing] enjoys some constitutional protection does not mean that there are not times and places inappropriate for its exercise." *Id.* at 86 (Burger, C.J., dissenting). Justice Stevens, in a concurring opinion, recognized that "the foliage of the First Amendment may cast protective shadows over some forms of nude dancing . . ." *Id.* at 80. As a result of the Court's agreement on this issue, *Schad* has generally and continually been recognized by lower courts for the proposition that nude dancing is protected expression.

In the Court's post-*Schad* decisions it has consistently re-affirmed its position in *Schad* that nude dancing performed as entertainment falls within the scope of the first amendment. In *Young v. Arkansas*, 474 U.S. 1070 (1985), Justice White, joined by Justice Brennan in dissenting from denial of certiorari, recognized the Court's "repeated indications that barroom nude dancing is a type of expression that is protected under the First Amendment" and

urged an explicit holding regarding the scope of that protection. In addition, in *Massachusetts v. Oakes*, 109 S.Ct. 2633, 2642 (1989), Justice Brennan, in a dissent joined by Justices Marshall and Stevens, declared that *Schad* affords nude dancing protection under the first amendment, and that modeling, like nude dancing, "enjoys like shelter under the First Amendment." *See also Sable Communications v. FCC*, 109 S.Ct. 2829, 2836 (1989) ("[s]exual expression which is indecent but not obscene is protected by the First Amendment"); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 719 (1980) (Stevens, J., dissenting) (stating that in *LaRue* the Court recognized "the protected expression implicated by nude dancing"). Most recently, in *FW/PBS, d/b/a Paris Adult Bookstore II v. City of Dallas*, 110 S.Ct. 596 (1990), the Court addressed a challenge to an ordinance enacted by the City of Dallas regulating "sexually oriented businesses" through a scheme incorporating zoning, licenses, and inspections. Various adult establishments, including several providing live nude dancing, sued for declaratory relief and a temporary as well as a permanent injunction. Six justices agreed that the ordinance violated the first amendment by establishing a licensing scheme without adequate procedural safeguards as required by *Freedman v. Maryland*, 380 U.S. 51 (1965), but they split into two camps as to what safeguards are required in this context. Justice O'Connor, writing for the three-member plurality, began her analysis by noting that

> [a]lthough the ordinance applies to some businesses that "apparently are not protected by the First Amendment, e.g., escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of these cases are protected by the First Amendment. Cf. *Smith v. California*, 361 U.S. 147, 150 (1959) (bookstores); *Southeastern Promotions, Ltd. v. Conrad, supra*, (live theater performances); *Young v. Mini Theaters, Inc.*, 427 U.S. 50 (1976) (motion picture theaters); ***Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing).**

Paris Adult Book Stores II, at 604 (emphasis added). The plurality then concluded that "the businesses challenging the scheme have a valid First Amendment interest." This recognition that the first amendment affords nude dancing some protection is implicit throughout the plurality opinion. With the exception of Justice Scalia in dissent, no other justice took issue with the plurality's position on nude dancing.

II.

From this reading of Supreme Court precedent,[3] we are constrained to hold today that, as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment. In reaching this conclusion, we are well aware that the distinction between conduct and expression is an elusive one.[4] While clearly not all conduct is expression, dance as entertainment is a form of conduct that is inherently expressive.

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[3] In dissent, Judge Easterbrook charges us with taking the position that the Supreme Court has already affirmatively decided the issue presented today. We take no such position. To the contrary, we have simply analyzed the relevant Supreme Court and lower court pronouncements in this difficult and sensitive area of the law. As an intermediate federal court, we are obligated to interpret the present state of the law as well as envision what the Supreme Court would hold if directly presented with the issue.

[4] Judge Easterbrook's dissent argues that we should not attempt to discern the line between conduct and speech because doing so draws us into the province of the legislature. Dissent slip op. at 96-99. It argues that by adhering to the broad categories of "speech" and "conduct" we can avoid this infringement. We respectfully suggest that doing so begs the question as to what is protected and what is not. We therefore decline the invitation to abdicate or avoid our responsibility to interpret the Constitution consonant with Supreme Court direction.

We begin with a brief examination of the mode of expression involved. Dance as entertainment is one of the earliest forms of expression known to man. Its written history goes back at least as far as fifth century classical Greece, where Euripides described the frenzied fertility dance in his drama *Bacchae*. Dance also has biblical roots. *See e.g.*, *Psalms* 149:3 ("let them praise his name with dancing, making melody to him with timbre and lire!"); *Psalms* 150:4 ("Praise him with timbrel and dance . . ."). In ancient Rome, dancing was an important part of the annual festivals of Lupercalia and Saturnalia which featured wild group dances that were the precursors of the later European carnival. Eroticism in dancing also has ancient origins. The modern-day belly dance, or *baladi*, can be traced to the Egyptians of the fourth century, B.C. Buonaventura, W. *Serpent of the Nile* (1990). From these ancient roots one can trace the forms of dance native to America. Indeed dance pervades our culture, from the American Ballet Theater to Broadway's *A Chorus Line* and *West Side Story*, from Hollywood's Astaire and Rogers to the local discotheque.

Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all "[t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance." Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is "to represent men's character as well as what they do and suffer." The raw communicative power of dance was noted by the French poet Stéphanie Mallarmé who declared that the dancer "writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose."

Any attempt to distinguish "high" art from "low" entertainment based solely on the advancement of *intellectual ideas* must necessarily fail. Judge Easterbrook contends in dissent that music and ballet are protected because music appeals to the intellect and ballet tells stories, whereas nude dancing offers neither. Dissent slip op. at 87. Not all ballet tells stories, however, and not all music appeals to the intellect. The art/entertainment distinction would remove the shield of the first amendment from many forms of nonverbal art because they fail to communicate a defined intellectual thought; this attempted demarcation would leave them essentially unprotected.

The State in effect advances the proposition that the dance involved loses its expressive qualities as the dancers lose their clothing. It is well established, however, that "[n]udity alone does not place otherwise protected material outside the mantle of the first amendment." *Schad*, 452 U.S. at 66 (citation omitted). Nor does the fact that the dance is sexual remove the mantle of protection: "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications v. FCC*, 109 S.Ct. 2829, 2836 (1989). And it is immaterial for constitutional purposes that nude dancing may be performed for profit. *See Joseph Burstyn v. Wilson*, 343 U.S 495 (1952). The State's position, therefore, distills down to the assertion that nude dancing is distasteful and/or morally repugnant.

While the ideas communicated by a particular dance may well vary according to the context in which it is performed, the communication of expression clearly does not. Attempts to distinguish between expressive and nonexpressive dance are misconceived and bring to mind the words of Justice Harlan in *Cohen v. California*, 403 U.S. 15, 25 (1970): "[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." It is irrelevant for the purposes of our inquiry that we may find the expression

inherent in nude dancing to be at odds with our particular tastes; just last Term the Court re-affirmed its belief that "[i]f there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S.Ct. 2533, 2544 (1989). As the Second Circuit has stated:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person [at the local pub].

Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975) (quoting *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)). The State conceded as much at oral argument when it agreed that the plaintiffs' precise dance routines would certainly be protected expression if they were performing the same routines but choreographed as part of a graduate Ph.D. thesis.

To determine whether this activity is sufficiently embodied with communicative expression to warrant first amendment protection, we must ask whether "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who view it." *Texas v. Johnson*, 109 S.Ct. 2533, 2539 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality.[5] Though this dance is clearly of inferior

[5] To the extent that the district court found otherwise, we find that it was clearly erroneous. Contrary to the positions taken by Judges Coffey (dissent slip op. at 71-72) and Easterbrook (dissent slip op. at 85-86) in dissent, the parties' characterizations (or the lack thereof) of their artistic endeavours as expressive or nonexpressive, while possibly relevant, cannot be determinative nor binding upon this Court for first amendment purposes.

artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' *Salome*, the erotic message communicated to the viewers is present in both performances. That Strauss' *Salome* tells a compelling story and the nude dancing at the Kitty Kat Lounge may not is not determinative; expression does not lose its protection for lack of a scripted plot. And it is apparent that those who view the respective dances readily comprehend the intended messages, for they advance currency to view them. The success of both the ballerina in an erotic production and the nude dancer in a barroom setting depend on the communication of their sensual message.

As stated above, dance as entertainment inherently embodies the expression and communication of ideas and emotions. The State's reliance on the nudity and the unappealing nature of the dance involved here do not serve to remove the partial cloak of protection afforded by the first amendment. Nude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless.

Not only does our holding today comport with Supreme Court precedent, it also is in consonance with the holdings of the numerous federal courts that have addressed the issue. The two Circuit Courts of Appeal that have confronted the protections afforded nude dancing, the Ninth and the Eleventh, have held that it is protected activity under the first amendment. *See International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (citing *Schad* to support the proposition that "we may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers"); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985) (in addressing ordinance barring topless dancing, the court noted that "we are bound to treat topless dancing as a form of expression which is protected at least to some extent by the First

Amendment"); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986) (relying on *Schad* and *Doran* for its determination that "topless dancing [is] expression, subject to constitutional protection within the free speech and press guarantees of the first and fourteenth amendments); *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) (in holding that nude dancing is protected activity, the court found that the assertion that "barroom nude dancing is not First Amendment activity because it is non-expressive and lacks any communicative content" is "controverted by *Schad*"); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982). The district courts are in general agreement as well. *See, e.g., Walker v. City of Kansas City, Mo.*, 691 F. Supp. 1243, 1249 (W.D. Mo. 1988) (citing *Schad* for proposition that "since an entertainment program may not 'be prohibited solely because it displays the human nude figure,' nude dancing is protected expression under the First Amendment"); *Doe v. City of Minneapolis*, 693 F. Supp. 774, 779 n.12 (D. Minn. 1988) ("live nude dancing is also protected expression under the First Amendment").[6]

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[6] The commentators have agreed with this interpretation of *Schad*. For a representative sampling, see: Stone et al., *Constitutional Law* 1167 (1986); Day, *The Incidental Regulation Of Free Speech*, 42 U. Miami L.Rev. 491 (1988); Rice, *The Search For Valid Governmental Regulations: A Review Of The Judicial Response To Municipal Policies Regarding First Amendment Activities*, 63 Notre Dame L.Rev. 561 (1988); Giokaris, *Zoning And The First Amendment: A Municipality's Power To Control Adult Use Establishments*, 55 UMKC L. Rev. 263 (1987); Note, *The Role Of "Secondary Effects" In First Amendment Analysis:* Renton v. Playtime Theatres, Inc., 22 U.S.F. L. Rev. 161 (1987); Poole, *Architectural Appearance Review Regulations And The First Amendment: The Good, The Bad, And The Consensus Ugly*, 19 Urb. Law. 287 (1987); Note, *Trademark Parody: A Fair Use And First Amendment Analysis*, 72 Va. L. Rev. 1079 (1986); Kellam & Lovelace, *To Bare Or Not To Bare: The Constitutionality Of Local Ordinances Banning Nude Sunbathing*, 20 U. Rich. L. Rev. 589 (1986); Rich & Brilliant, *Defamation-In-Fiction: The Limited Viability of Alternative Causes of Action*, 52 Brooklyn L. Rev. 1 (1986);

(Footnote continued on following page)

Our inquiry cannot end here. Having concluded that the activity involved is within the ambit of the first amendment, we must next examine whether the Indiana statute is a valid restriction on that protected expression. Regrettably, Indiana does not record the legislative history of its statutes. At oral argument the State asserted that the purpose of the public indecency statute was the protection of public morality generally, and the family structure in particular. The State possesses the broad powers to effectuate this legitimate and significant interest through public education and the appropriate exercise of its police powers. However, in advancing this interest it must operate within the prescriptions of the first amendment.

It is a fundamental precept of the first amendment that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against government interference and restraint. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The first amendment does not discriminate among ideas. The messages conveyed by the performances in question, no matter how unappealing to one's personal value system, are protected nonetheless. Indiana's attempt to ban nude dancing in pursuit of its aforementioned interest is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse.[7] "When the government, acting as censor, under-

[6] *continued*
Simon, *The Authority Of The Framers Of The Constitution: Can Originalist Interpretation Be Justified?*, 73 Calif. L. Rev. 1482 (1985); Yen, *Judicial Review Of The Zoning Of Adult Entertainment: A Search For The Purposeful Suppression Of Protected Speech*, 12 Pepperdine L. Rev. 651 (1985); Note, *Freedom of Speech- Regulation Of Live Entertainment*, 96 Harv. L. Rev. 231 (1981).

[7] In his dissent, Judge Easterbrook contends that the statute is "unrelated to the suppression of free expression." Dissent slip op. at 79. The stated purpose of the statute is the preservation of a particular set of views; those reflecting the Indiana legislature's

(Footnote continued on following page)

takes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975). As we have recognized, "above all else, the First Amendment means that government has no power to restrict expression because of its message or ideas . . ." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (Easterbrook, J.) (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)). To those who understandably find objectionable the type of conduct sought to be condemned by the State, we offer the prescription of Justice Brandeis in *Whitney v. California*, to wit: "the remedy to be applied is more speech, not enforced silence." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

This is not to suggest that the State is powerless to *regulate* the presentation of nude dancing. On the contrary, the State retains a great deal of control. A sovereign may establish reasonable time, place and manner restrictions on protected expression. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). Such legislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks and beaches. Similarly, it may regulate expressive conduct for reasons unrelated to the suppresion of speech. *United States v. O'Brien*, 391 U.S. 367 (1968). It may also regulate nude dancing under the power granted it by the twenty-first amendment. *California v. LaRue*, 409 U.S. 109 (1972); *City of Newport v. Iacobucci*, 107 S.Ct. 383 (1986). And it most certainly may ban obscene nude dancing. *Sable Communications*, 109 S.Ct. at 2835.

[7] *continued*
view of "public morality." In meeting this intended goal, the statute directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's prescribed vision. As such, it is *directly* related to the suppression of free expression.

Despite the State's laudable concerns which apparently are the bases of the Indiana statute, the total ban at issue here does not fall within any of these constitutionally permissible areas of legislation. If the State wishes to regulate non-obscene expressive activity or public nudity, it may do so, but only in consonance with the first amendment.

III.

The statute is unconstitutional as applied. Accordingly, the judgment of the district court is REVERSED and the State is enjoined from enforcing its public indecency statute, IND. CODE 35-45-4-1, against these plaintiffs to prohibit non-obscene nude dancing as entertainment.

CUDAHY, *Circuit Judge*, concurring:

I concur in Judge Flaum's excellent opinion for the court. He has effectively marshalled the Supreme Court and other authority that points in the direction of constitutional protection for nude dancing *qua* entertainment. That authority compels a result that is correct in this case.

I do, however, have concerns that I shall briefly note. Despite impressive displays of scholarly analysis and broad-ranging erudition on all sides, the need to invoke the First Amendment here strikes me as a bit trivializing and, perhaps, unworthy. The application of the Amendment to these facts is correct as a matter of law. I believe we of the majority are doing what the law commands, but the high purposes of the Amendment seem, in these circumstances, in some danger of being lost. I hasten to add, however, in that connection that I do not think it appropriate to make fine distinctions between the favored entertainments of "Joe Sixpack" and those of "Mrs. Gotrocks." As the majority notes, the Free Speech Clause, by protecting the freedom of expression, necessarily leaves matters of expression and style to the individual.

It seems to me beyond doubt that a barroom striptease is "expressive." Even if relatively restrained, as are the

videos in evidence here, a striptease sends an unadorned message to a male audience. It is a message of temptation and allurement coupled with coy hints at satisfaction. In a real barroom, messages would probably also flow in the opposite direction, in the form of encouraging comments to the performer from the patrons.[1] These responses speak strongly to the fact that a message is being sent and received. It is also clear that the message of the striptease is not a subject that the Founding Fathers had in mind in drafting the First Amendment.[2] That fact is certainly not dispositive, nor perhaps even probative, but it suggests a need for caution in making the Amendment do service in situations as improbable as this one seems to me.

POSNER, *Circuit Judge*, concurring in the opinion and judgment of the court. Public performances of erotic dances débuted in Western culture in the satyr plays of the ancient Greeks, were suppressed by Christianity, and, with Christianity's grip loosening, reappeared in the late nineteenth and early twentieth centuries. They reappeared in a variety of forms: as the can-can and the music-hall chorus line, from which the Folies Bergère and its tame American counterparts—the Ziegfeld Follies, and more recently the Radio City Music Hall Rockettes and the chorus lines in Broadway and Hollywood musicals—descend. As the Dance of the Seven Veils in Richard Strauss's opera *Salome* (1905), from which the fan dancing of Sally Rand and the decorous striptease of Gypsy Rose Lee, or of Gwen Verdon in the musical comedy *Damn Yankees*, may be said to descend. Ballet was nothing new in the nineteenth century; but as the costumes of ballet dancers became scantier, the erotic element in ballet became more pronounced, reaching scandalous proportions in Diaghilev's

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[1] *E.g.*, "Take it off; take it off!"

[2] No doubt, however, such messages—sent according to the style of the day—were known to the Framers.

L'après midi d'un faune (1912) (an example, and not an isolated one, of male erotic dancing) and becoming a staple of distinguished companies like the New York City Ballet and the American Ballet Theater. "Modern dance," a ballet offshoot pioneered by, among others, the erotic dancer Isadora Duncan, has long been partial to nudity. Examples of erotic dance in non-Western cultures include not only belly dancing but also the overtly erotic nude dancing of Les Ballets Africains de Keita Fodeba, which, but for its exoticism, would be considered shockingly explicit. For remarkable description of fertility dances see Sachs, World History of the Dance 85-104 (1937); on erotic and nude dancing generally, see Cheshire, *Eroticism in the Performing Arts*, in Webb, The Erotic Arts 297-306 (rev. ed. 1983); Sorell, Dance in Its Time 425-28 (1986). The law's efforts to restrict such dancing are detailed in an Annotation, *Topless or Bottomless Dancing or Similar Conduct as Offense*, 49 A.L.R.3d 1084 (1973), 49 A.L.R.3d Supp. 59 (1989).

De gustibus non est disputandum; but whether one has a taste or a distaste for erotic dance in general or striptease dances in particular, to say as the district judge did in this case that a striptease dance is not "expressive activity," but "mere conduct," *Glen Theatres, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988), is indefensible and a threat to artistic freedom. This is not to suggest that the State of Indiana has no power to regulate nude striptease dancing; it has ample power. But to try to justify that power, as the district judge in this case tried, on the ground that such dancing is not expression is misguided. And, *as the parties have framed the issues*, no alternative justification is possible in this case. The qualification is an important one, and I shall return to it.

An Indiana statute makes public indecency, including appearing nude in public, a crime. Ind. Code § 35-45-4-1(a)(3). The normal operation of the statute is illustrated by *Elliott v. State*, 435 N.E.2d 302 (Ind. App. 1982), where the defendant was convicted of urinating in public. However, in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979),

appeal dismissed for want of a substantial federal question under the name *Clark v. Indiana*, 446 U.S. 931 (1980), the Indiana Supreme Court interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public. The interpretation was not inevitable. *State v. Brooks*, 275 Ore. 271, 550 P.2d 440 (1976); compare *City of Chattanooga v. McCoy*, 645 S.W.2d 400, 401 (Tenn. 1983). But, having been made, it induced the Indiana court in *Baysinger*, in an effort to save the constitutionality of the statute, to carve out an exception for performances having an expressive character. That is how the issue of "expression" got into this case. If the striptease dances that the plaintiffs want to put on for their customers are not expressive, then since at the end of the dances the dancers are nude, the statute makes the dances criminal.

Indiana is exceptional although not unique among contemporary American states in attempting, without recourse to the Twenty-First Amendment, to impose a state-wide ban on erotic dance performances that are not obscene, merely because the performances involve nudity—and a bare breast is nudity within the meaning of the Indiana statute. The statute's reach may be an accident of interpretation. The intended scope may well have been narrower; and a differently drafted statute could, as I shall explain, achieve the state's legitimate goals without raising serious constitutional questions. So this case may be something of a freak; but it is a fascinating freak.

If the district judge had said that the dances in issue are not classy, he would have been on sound ground. The record contains a videotape of the dances that the proprietor of the "Kitty Kat Lounge" would like to exhibit. The name of the establishment does not promise high culture, nor the fact that it is a bar rather than a theater, nor (a related point) that the compensation of the dancers depends on the number of drinks they induce appreciative customers to buy after the dance. The dancers are presentable although not striking young women. They dance on a stage, with vigor but without accomplishment, to the

sound of a jukebox, and while dancing they remove articles of clothing (beginning, for example, with a glove) until nothing is left. Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more. It is worth pausing a moment to ask why. Nudity as titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is no shock value in a bare breast, while in Victorian England, where decent women were expected to wear dresses that reached from the top of the neck to the floor—where even the legs of furniture were sometimes clad for the sake of decency—a bare ankle was a sensation. Since then female dress has become progressively less modest, and today many decent women appear in public in states of undress (mini-skirts, hot pants, slit skirts, body stockings, see-through blouses, decolletage becoming outright topless evening wear) that would have been considered nakedness, or the garb of prostitutes, thirty years ago. A striptease that ended in a degree of nudity no longer suggestive of preparations for sex—a striptease that left the stripper garbed as she might be for an expedition to the supermarket—might lack erotic punch today.

In any event there is no contention that the stripteases of the "Kitty Kat" dancers are obscene. It would be difficult to make such a contention with a straight face at a time when a career respectable in the eyes of many people can be founded on posing in the nude for men's magazines. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985). The contention, rather, is that the dances are not expressive, so the First Amendment does not protect them, so there is no obstacle to enforcing the Indiana statute against the dancers and their accomplice, the proprietor of the Kitty Kat Lounge. If this reasoning is correct, the arts are in jeopardy.

Dance, as Judge Flaum emphasizes with pertinent references, is a medium of expression, of communication. What it expresses, what it communicates, is, like most art—particularly but not only nonverbal art—emotion, or more

precisely an ordering of sights and sounds that arouses emotion. Ballet is "an exact and flexible language to communicate formal fantasy." Denby, Dance Writings 507, 509 (1986). "In your excitement as you watch the quick dancing, it will often evoke in passing an intensely poignant fantasy image of human relations." *Id.* at 512. "Susceptibility to ballet is a way of being susceptible to animal grace of movement." *Id.* at 530. Erotic dances express erotic emotions, such as sexual excitement and longing. Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. But of course nudity and disrobing are not *invariably* associated with sex. The goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. The dance ends when the preparations are complete. The sequel is left to the viewer's imagination. This is the "tease" in "striptease."

Because the dancers at the Kitty Kat Lounge are not professional dancers, because three of the four dances were not choreographed, because the music to which they dance is canned, and because the dancers sell drinks to the customers afterward, it is tempting to suppose that the "expressive" elements of their "performance" are phony—that the dance and the music are figleaves to conceal the absence of figleaves. Probably the supposition is erroneous; certainly it is not backed by evidence. The striptease was not invented in order to place a cultural patina on displays of naked women. Of course, there would be no female stripteases without a prurient interest in the female body; but that is just to say that there would be no erotic art without Eros. Though there is no striptease without some stripping—in today's moral climate, without a great deal of stripping—the dancing and the music are not distractions from the main theme, patched

on to fool the censor; they are what make a given female body expressive of a specifically sexual emotion. The striptease is the ensemble of the music, the dance, the disrobing, and the nude end state; it is more erotic than any of its components; and what makes it more erotic than the body itself, or the disrobing itself, is, precisely, that it is *expressive* of erotic emotion. The State of Indiana may be empowered to regulate or even suppress it, but not on the ground that it is not expression.

The conclusion that striptease is an expressive medium can be resisted on four grounds: the conclusion leads to a *reductio ad absurdum*; the only expression protected by the First Amendment is the expression of ideas and opinions; the amendment does not protect mere entertainment; the amendment protects speech, not conduct.

1. It is tempting to argue that a striptease just *can't* be expressive because if it is then everything is—including kicking one's wastebasket in anger and putting geraniums in a window box. These examples are not the same, however. There is a sense in which everything we do consciously and much of what we do unconsciously is expressive—is the visible counterpart to (or "expression" of) some "inner" mental state, often an emotion such as anger or fear or joy. Kicking the wastebasket is expressive in this sense. But the expression that is relevant to freedom of speech, and absent when the wastebasket is kicked in private, is the expression of a thought, sensation, or emotion *to another person*. This is a narrower concept of expression than the first but it is of course enormously broad, encompassing not only the geranium example but the whole field of human communication, verbal and nonverbal. We communicate with each other by dress, grooming, deportment, and gestures, as well as by words. Not everything in this enormous range of communicative activity is within the scope of the First Amendment. Social dancing is not. *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989). Nor is casual chit-chat. *Swank v. Smart*, No. 89-1360, slip op. at 4 (7th Cir. March 27, 1990). But what

is excluded is not excluded *because it is not expression*; it *is* expression.

Let me try to refine the distinction between the expressive and the protected with the following unrefined examples: a videotape of a couple engaged in sexual intercourse, filmed without their knowledge and exhibited to the patrons of the Kitty Kat Lounge; the same videotape, made to be shown to psychologists specializing in the treatment of sexual dysfunction; a videotape of a couple, also engaged in sexual intercourse, but the man and the woman are actors who endeavor by their movements and expressions to maximize the emotional impact of their act on the viewer. The first videotape is not expressive, but is obscene (nude sunbathing would also be nonexpressive, but would not be obscene). The second is neither. The third is expressive and obscene. The third is not saved from condemnation because it is expressive. Most pornography is expressive, indeed expressive of the same emotions that a striptease expresses. The difference is that the striptease is not obscene by modern standards.

If this analysis is wrong, our decision in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986), is wrong. Indianapolis had enacted an ordinance forbidding "pornography," defined as "the graphic sexually explicit subordination of women" through various means including pictures of women in "postures or positions of . . . display." The videotape of the Kitty Kat dancers is pornography within the meaning of the ordinance. We held that the ordinance violated the First Amendment because it was an effort to control the way people think about women and sex. Neither the ordinance, nor our ground for invalidating it, would have made sense if pornography were not expressive in a sense relevant to the First Amendment. The doctrine that forbids restrictions on speech that are based on the viewpoint of the speaker is a doctrine of the First Amendment; its invocation presupposes that what is being restricted is speech. An ordinance that forbade nude

sunbathing would not violate the First Amendment even if the purpose was to change people's thinking about women and sex, because it would not be prohibiting "speech," however broadly defined. *People v. Hollman*, 68 N.Y.2d 202, 500 N.E.2d 297 (1986); *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984). Unless nonobscene pornography (a category that includes nude striptease dancing) is speech, the Indianapolis ordinance could not have violated the First Amendment.

2. The second argument against acknowledging that striptease dancing is expression is that it is not the *type* of expression that the First Amendment protects, because it is not the expression of ideas or opinions. Indeed it is not the expression of ideas or opinions (nor have the appellants ever contended otherwise). But if this were decisive against the application of the First Amendment, as urged for example in Wright, *A Rationale From J S. Mill for the Free Speech Clause*, 1985 S. Ct. Rev. 149, 164-69, it would thrust outside the amendment's boundaries virtually all nonverbal art—except the relatively small fraction that is didactic—and much literature as well. The implications for nonvocal music are particularly arresting. By straining one can perhaps find "ideas" in a few tone poems and other programmatic music. For example, the opening chords of Richard Strauss's *Ein Heldenleben* (*A Hero's Life*) may be said to convey an idea of the heroic. But what is really being conveyed is not an idea but a feeling, a feeling of grandeur that evokes or enhances the idea of the heroic; and in part the feeling is conveyed (or identified) by the title of the piece. Beethoven's heavy use of march themes lends, by association, a martial air to much of his music, yet it would be odd to describe the music as being "about" political or military affairs. Music that imitates the twittering of birds does not convey an ornithological "message," and Gustav Holtz's *The Planets* is not a treatise on astronomy. Some nonvocal musical works convey simple narratives, for example the story of the cathedral that rises from and sinks back into the sea,

"told" in Debussy's *La Cathedrale engloutie*. But narratives are not ideas, and anyway a striptease is a narrative quite as elaborate as that found in pantomimic ballets (such as *Romeo and Juliet*) and more elaborate than the narratives in wordless music. Most nonvocal music has no verbal—paraphrasable—content whatsoever, and much of it does not even express a specific emotion.

Admittedly, not all thought is verbal, especially if "language" is narrowly interpreted to exclude mathematics and other nonverbal symbolic systems. But even if "thought," "concept," "idea," and "opinion" are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions. Insofar as it is more than beautiful sound patterns, music, like striptease, organizes, conveys, and arouses emotion, though not sexual emotion primarily. If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart's piano concertos and Balanchine's most famous ballets are not expression. This is not to suggest that striptease dancing is indistinguishable from these other forms of expression. But they cannot be distinguished on the ground that a piano concerto and a (nonpantomimic) ballet express ideas and a striptease expresses emotion. If the concerto and the ballet have meaning—and I do not doubt that there is a meaningful sense in which they do—so has the striptease.

Pictorial art is in some ways closer to striptease than music is, because so much painting and sculpture are of naked women. The distinguished collection of Titian nudes in the National Gallery in Washington includes *Venus With a Mirror*, which depicts a voluptuous, coiffed and bejewelled, golden-haired woman—nude within the meaning of Ind. Code § 35-45-4-1(b)—sitting on a couch and looking at her face in a mirror held up by a cherub (Cupid—his quiver is at his feet), while another cherub hovers beside her waiting to crown her with a wreath. Walker, The National Gallery of Art 209 (1975) (pl. 259). The painting does not express an idea, a thought, or an opinion. It

is not a sociological account of a sixteenth-century Venetian woman's toilette, or a treatise on classical mythology. It uses that mythology as a source of iconography, and to the extent that by doing so the painting evokes the story of Venus it may be said to have narrative content; but so does a striptease. What the painting primarily conveys to the viewer is not a story, let alone an idea or an opinion, but a complex of feelings—feelings of voluptuousness, sensuality, beauty, harmony, sumptuousness, sexual allure (we know what Venus is the goddess of).

We might try to close the gap between the intellectual and the emotional by saying that the painting expresses a *concept* of beauty, of opulence, of balance, and so forth. But among the "so forth" are feminine sexuality and desirability, and if these are "concepts" in *Venus With a Mirror* they are "concepts" in a striptease (or in a *Playboy* pin-up) in just the same sense. The striptease version is coarse, unsubtle, "artless," even degraded, but the two works are "conceptual" to the same degree. Feminists forcefully assert the continuity of high and low culture: "Within the history of art, the female nude . . . is a paradigm of Western high culture with its network of contingent values: civilization, edification, and aesthetic pleasure. The female nude is also a sign of those other, more hidden properties of patriarchal culture, that is, possession, power, and subordination." Nead, *The Female Nude: Pornography, Art, and Sexuality*, 15 Signs 323, 326 (1990). The feminists have a point, even if it is overstated; a more neutral observer (criticized by Nead, *id.* at 332) has called Titian's Venuses "highly erotic and presumably highly effective pin-ups for the rich and powerful." Webb, *supra*, 131.

The reason we think that art is an intellectual medium and therefore has nothing important in common with striptease is that most of us obtain no enjoyment from art. It requires an educated taste to distinguish *Venus With a Mirror* from a camp photo of a fat woman. Knowing that it is a cultural monument we assume that its significance must be intellectual, since it is dead to most of us

emotionally. But the painting is not an intellectual statement; there are no ideas in the painting. This would be even clearer if one were speaking of abstract rather than representational painting. There is pattern, design, harmony, and color in abstract painting, and these attributes evoke pleasure and other emotions in an appreciative viewer. But there is no story, no articulable idea, no verbal meaning. The notion that all art worthy of the name has a "message" is philistine, and leads to the weird conclusion that nonrepresentational art and nonprogrammatic, nonvocal music are entitled to less protection under the First Amendment than striptease dancing because the latter has a more distinct, articulable message. And likewise that Beethoven's string quartets are entitled to less protection than *Peter and the Wolf*.

I said earlier that nudity is a relative concept. The bare breast of Venus in *Venus With a Mirror* is tame stuff by modern standards and this tameness may lead us to downplay or even overlook the erotic element in the painting. If we consider instead the nudes of a great modern master, such as Balthus (Balthasar Klossowski), we cannot overlook the primacy of the erotic in nude painting. For examples, see *Alice*, *Nude With a Cat*, and *The Room*, in Rewald, Balthus 28, 117-19 (1984) (fig. 35 and pls. 31 and 32). Balthus's eroticism happens not to be of the innocent and wholesome variety; it is sinister, creepy, obsessed with the bodies of prepubescent girls (girls Lolita's age), "Freudian," at times sadistic. Balthus is a great artist whose artistic interest in the female body is prurient. Strauss's *Salome*—whose Dance of the Seven Veils is everyone's favorite example of constitutionally protected striptease—is a classic of *fin de siècle* decadence; it is surpassed in unwholesomeness only by Oscar Wilde's play *Salomé*, which supplies the libretto for *Salome*, and by Aubrey Beardsley's illustrations for *Salomé*. The difference between Balthus' presentation of the naked female body and that of the dancers at the Kitty Kat Lounge is that he is a great artist and they are undistinguished popular entertainers. It is not a difference in kind; it is

not a difference between expressive and nonexpressive activity; it is not a difference between arty nudes and naked bodies. It is a difference in aesthetic quality, and while such differences can redeem obscene art, *Miller v. California*, 413 U.S. 15, 24 (1973), they cannot justify the suppression of the nonobscene.

Some paintings—Rembrandt's portraits, for example—we are inclined to call "profound." This usage is fine, provided we understand that the profundity in question is not intellectual but emotional. Here is a description of the self-portrait that Rembrandt painted in 1659 (Walker, *supra*, at 271 (pl. 357)), three years after he had declared bankruptcy. "He saw reflected [in the mirror from which he painted the portrait] a face lined with age and misfortune. He saw eyes which had searched more profoundly into the human soul than those of any other artist. He saw a mouth and chin weak, infirm of purpose, manifesting that flaw in his character which had ruined his life. His hands are grasped as though in anguish at the spectacle of a self-ruined man. There exists no painting more pitiless in its analysis or more pitiful in its implications." *Id.* at 270. "Analysis" is being used here in a special sense. There is nothing discursive, verbal, intellectual in the portrait. It is not a commentary on bankruptcy law, human weakness, or social injustice. It is the pictorial rendition of the emotions that a man in whom great talent is mixed with great weakness might feel. The mood is remote from that of Venus looking in her mirror but the difference has nothing to do with the epistemic character of these paintings. The difference between the intellectual and the emotional is not the difference between heavy and light. There are solemn emotions, and there are frivolous ideas.

The emotional element predominates in much verbal art as well as in most nonverbal art. When T.S. Eliot wrote

> Highbury bore me. Richmond and Kew
> Undid me. By Richmond I raised my knees
> Supine on the floor of a narrow canoe.

> My feet are at Moorgate, and my heart
> Under my feet. After the event
> He wept. He promised 'a new start.'
> I made no comment. What should I resent?

he was not expressing an idea; he was finding a form of words by which to convey the emotion of sexual revulsion. There is an analogy to the distinction in copyright law between idea and expression. Eliot could not have obtained copyright protection for any of the ideas that might be extracted from *The Waste Land* by paraphrase: in the passage I have quoted, the idea that sex is sordid and disgusting. He could obtain copyright protection only for the precise verbal form in which the idea was expressed. It is the expression that gives the idea impact, just as it is the dancing and the music and the stripping that give the nudity of the striptease dancer impact. The idea in itself is nothing—banal, undeveloped, mostly false—just as nudity in itself is nothing, or very little. These are just the materials from which the great writer or the popular entertainer makes the emotional brew that we call art or popular entertainment. In either case the artist's business is emotion, not ideas. Of one literary artist Eliot said, "He had a mind so fine that no idea could violate it." *Henry James*, in Selected Prose of T.S. Eliot 151 (Kermode ed. 1975).

One can argue from the text and background of the First Amendment that the constitutional protection of freedom of speech is limited to the discursive and the didactic, that nondidactic art should be totally excluded, or at the very least that low-grade erotic entertainment should be—the Founding Fathers would writhe in their graves if they knew that the nude dancers of the Kitty Kat Lounge could unwrap themselves with the First Amendment. And one can reply that such arguments merely demonstrate the inadequacy of original understanding as a guide to constitutional interpretation; that they would if accepted change the Constitution from a living document into a petrified reminder of the limits of human foresight; that a conception of free speech which privileges the burning of the

American flag (*Texas v. Johnson*, 109 S. Ct. 2533 (1989)) but permits government to ban performances of twelve-tone music is more absurd than one that protects flag burning, twelve-tone music, and striptease; and that if the purpose and scope of the First Amendment's speech and press clauses are exhausted in the protection of political speech, because freedom of political speech is all that is necessary to preserve our democratic political system, this implies the exclusion from the amendment's protections not only of all art (other than the political) but also of science. For one can have democracy without science, just as one can have democracy without art.

The debate has been resolved—for judges at our level anyway, and for now anyway—by the decisions anatomized in Judge Flaum's opinion, particularly the Supreme Court's decision last term in *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (citations omitted):

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guidelines must meet the demands of the First Amendment.

The rock music in question had lyrics. But the Court's reference in the second sentence to music's appeal to the emotions, and its citation (omitted from the quotation) to an article about Soviet ambivalence toward Stravinsky—a composer primarily of nonvocal music—make it implausible to suppose that the Court thought it was speaking

only of vocal music; and it did not say it was. In another decision the Court has said that "entertainment, as well as political and ideological speech, is protected" by the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). This court has held that wordless music is speech within the meaning of the amendment. *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983).

I am less interested in particular decisions than in fundamental principle. If the only expression that the First Amendment protects is the expression of ideas and opinions, then most music and visual art, and much of literature, are unprotected. This would be a shocking contraction of the First Amendment as it has come to be understood. If the only way to exclude nude dancing from the protection of the amendment is to exclude all nonpolitical art and literature as well, the price is too high. "A rule cannot be laid down that would excommunicate the paintings of Degas." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

3. Maybe the price need not be paid; maybe "mere entertainment" is not constitutionally protected after all. The passage I quoted from *Schad* cannot have been meant literally. Anything that gives pleasure can be counted as entertainment, yet not everything that gives pleasure is expressive. I might find a display of northern lights entertaining; this would not make that display an expressive activity. However, while not all entertainment is expressive, some certainly is. Art is entertainment. Not only is much art created in order to entertain—Shakespeare's plays, for example—but art that was religious or political in its origins is today valued largely for its entertainment value. The Homeric epics and the religious art of the Renaissance are examples. For those who actually love art it is primarily as a superior form of entertainment and consolation that it is loved rather than as a source of insight or edification, although it often is that as well. So as a classification for use in applying the First Amendment, "entertainment" is both underinclusive and overin-

clusive. It includes things that the First Amendment cannot possibly be thought to include (such as the northern lights) and it excludes things—namely, most of art—that it is the whole purpose of the classification to include.

Still, can the First Amendment really be thought to cover *all* expressive entertainment? The example of bullfighting comes to mind. Bullfighting is an expressive activity and even has affinities to the dance. There is music, pageantry, elaborate costumes, the march of the toreadors, the dance-like steps with which the matador incites and parries the bull, the picadors on their splendidly caparisoned prancing horses. The whole is orchestrated and choreographed for maximum emotional impact; among the feelings conveyed are grace, courage, suffering, fear, beauty, cruelty, splendor, and *machismo*. Hemingway, Death in the Afternoon (1932). Bullfighting is more expressive, more artistic, culturally richer than the most popular American sports. Is it therefore protected by the First Amendment? It is not; the First Amendment no more forbids the prohibition of bullfighting than it does the prohibition of obscenity. There are many grounds for regulating and even prohibiting particular forms of expressive activity. In the case of bullfighting, the grounds are aversion to mutilating or killing animals for sport and also aversion to sports that are highly dangerous to the (human) participants. The Constitution does not place freedom of expression above all other values; it does not privilege gladiatorial contests any more than it privileges the employment of children to make pornographic movies. Nevertheless when government suppresses bullfights it is not suppressing mere "entertainment" that has little in common with ballet. They have a great deal in common. The difference between bullfighting and ballet has nothing to do with expressiveness; they are equally expressive, albeit of a different range of emotions. The pertinent difference is that ballet does not entail the torture and killing of animals or a high risk of injury or death to the dancers, and bullfighting does.

In calling bullfighting "expressive" I may seem to be implying, despite my disclaimer, that bullfighting *must* be protected by the First Amendment from regulation or suppression; for does not the amendment protect freedom of expression? I repeat that I do not believe that the First Amendment protects bullfighting. But I insist that bullfighting is an expressive activity. To deny this would be to play the unedifying semantic game of persuasive definition. Bullfighting is forbidden not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value.

I said earlier that casual chit-chat, although an expressive activity, is not protected by the First Amendment. A public theater that ejects a patron for talking to his neighbor during the performance of a play does not commit a prima facie violation of the First Amendment. Perhaps, like casual social conversation, the striptease makes so little contribution to the marketplace of ideas that it can be suppressed even though it is an expressive activity formally akin to the highest forms of art. But here we risk being misled by metaphor. "Marketplace of ideas," useful short-hand though it is for the domain of the First Amendment, leaves out not only nude dancing but also the greater part of art, as well as much of politics, of journalism, of education, of philosophy, of law, and in short of nonscientific discourse generally, for such discourse is heavily rhetorical, emotive. To observe that ordinances forbidding nude dancing in bars "do not prohibit an exchange of ideas which might tend to bring about political or social change," *Yauch v. State*, 109 Ariz. 576, 579, 514 P.2d 709, 712 (1973), or that "it is difficult to conceive of ideas entitled to First Amendment protection which can be solely—or even best—expressed by baring the anus or genitals," *Kew v. Senter*, 416 F. Supp. 1101, 1105 (N.D. Tex. 1976), is correct; it just misses the point. Art and popular entertainment are not awkward or failed attempts to communicate ideas, and the protection of the First Amendment is not limited to ideas.

Once the relevant marketplace is understood to include expressive activity concerned with the emotions as well as expressive activity concerned with ideas—to include narrative, imagery, rhetoric, and design, as well as discursive prose—it becomes evident that erotic performances are a major component of the First Amendment marketplace, while social conversation, ballroom dancing, and other "audience of one" communicative activities are a minor component. Granted, the suppression of one genre of erotic art, the striptease, would not truncate the marketplace greatly. But lest its suppression turn out to be the first step on the road back to the institutionalized puritanism of Cromwell's reign—during which all theatrical performances, including performances of Shakespeare's plays, were prohibited—we need a principled ground for distinguishing the striptease (or some subcategory of striptease typified by the dances at the Kitty Kat Lounge) from other forms of nonobscene erotic expression. None has been suggested. At argument, the lawyer for the State of Indiana proposed to limit the protected category to "established" works of art. This approach would have excluded Manet's great work *Déjenuer sur l'herbe*, in which a naked woman is depicted picnicking with two fully clothed men; far from being an established work of art when it first burst on the art scene in 1863, it caused a scandal.

Although much of today's high culture began as popular entertainment, the likelihood that the videotape of the Kitty Kat stripteases will one day achieve the cultural renown of *Déjeuner sur l'herbe* is vanishingly close to zero. Anyone who doubts this is carrying relativism and skepticism too far. But aesthetic quality cannot be the standard that judges use to determine which erotic performances can be forbidden and which cannot be. There are no objective standards of aesthetic quality, and while we allow obscene works to be "redeemed" by "evidence" of aesthetic quality, it hardly follows that we should allow works that are not obscene to be condemned on the basis of evidence suggesting a lack of aesthetic quality. On the contrary,

the fact that the law protects obscene *art* attests to a justified modern anxiety about censorship. The practical effect of letting judges play art critic and censor would be to enforce conventional notions of "educated taste," and thus to allow highly educated people to consume erotica but forbid *hoi polloi* to do the same. The robust paternalism and class consciousness that once permitted such a distinction have lost their legitimacy. The music held constitutionally protected in *Reed v. Village of Shorewood* was rock and roll. The Constitution does not look down its nose at popular culture even if its framers would have done so. *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975). "[T]he taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change." *Bleistein v. Donaldson Lithographing Co.*, *supra*, 188 U.S. at 252. As applied by the district court in this case, the Indiana statute with its judge-made exception for "expressive" nudity discriminates between upper-class and lower-class nonobscene erotica. The First Amendment forbids this kind of discrimination.

I have been assuming that the line between expressive (in the sense of communicative) activity and nonexpressive activity is distinct. It is not. Wright, *supra*, at 166-68. There are some clearly expressive activities and some clearly nonexpressive ones but there is also a vast gray area populated by street performers who swallow swords or walk on glowing coals or guess people's ages or weights, by people who wish to make a "statement" by dressing outlandishly, by creators of video games, by contestants in dance marathons, and so on without end. The government has a greater scope for regulation in the gray area. Maybe, indeed, that area could be regarded as outside the boundaries of the First Amendment (*de minimis non curat lex*), in which event the only constitutional constraints would be those very loose ones that the due process clause places on harmless liberties not involving the exercise of freedom of expression. *Swank v. Smart*, *supra*, slip op. at 5-7. In claiming that expression is a continuum

I am not contending that the boundaries of the First Amendment must be left utterly elastic. It is desirable to have some First Amendment rules and not leave everything to be governed by standards and sliding scales. Put more precisely, standards and sliding scales can be used to precipitate out rules, and have been used in this way. The rule that social dancing is not an activity protected by the First Amendment, and the rule that social conversation is not, are crystallizations of a process of weighing the relevant policies and values to determine the amendment's appropriate scope. Another sensible First Amendment rule might be that government has carte blanche to regulate dangerous sports, irrespective of the expressive content of some of those sports; that would take care of bullfighting. There may be room for rules about public nudity as well. What is indefensible is to set up "entertainment" as a category of activities, distinct from "art," that government can regulate without regard to the First Amendment. Or to suppose—unless one is prepared to deprive most art of constitutional protection—that there is a rational conception of "expression" that places striptease dancing on the nonexpressive side of the divide.

4. If the line between the expressive and the nonexpressive is indistinct, the "line" between speech and conduct, between live performances and performances on paper, videotape, or compact disc, is a blur. (This case is a symphony of sterile dichotomies.) Normally, although not always, the medium in which experience is encoded is irrelevant to its expressive character and social consequences. The pitter-patter of raindrops does not become expressive activity by being recorded, and a recording of Beethoven's Ninth Symphony is not entitled to more constitutional protection than the live performance from which the recording was made. The government could not shut down the theaters on the ground that what actors do is conduct, not speech, with the result that a production of *King Lear* by the Royal Shakespeare Company would be outside the

scope of the First Amendment but a nonobscene pornographic movie within it.

There are exceptions to the parity of the live and the canned performance. A murder intended as a political demonstration is illegal; a movie in which a murder is simulated is not. The reason is not that one is conduct and one speech, but that the conduct involved in the two performances is different. In the first, a person is killed; no one is killed or injured in the second. It is on this theory that child pornography, even if not legally obscene, can constitutionally be suppressed. *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469-70 (U.S. April 18, 1990). Speech is suppressed in order to get at the underlying conduct, the employment of children to make pornography. So might a state prohibit photographs of sex acts performed by persons paid to perform them; speech would be suppressed to get at the underlying conduct, a variant of prostitution. *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128 (1988); *State v. Kravitz*, 511 P.2d 844 (Ore. App. 1973). The striptease dancers in our case are not children and are not engaging in sex acts, and although it might be possible to distinguish between live and canned nude dancing on the ground that in the former the dancers are accessible to the audience, Indiana has disclaimed any such distinction as a basis for upholding its statute.

The true reason I think for wanting to exclude striptease dancing from the protection of the First Amendment is not any of the lawyers' classification games that I have been discussing, such as expression versus nonexpression, ideas versus emotions, art versus entertainment, or speech versus conduct. It is a feeling that the proposition, "the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples," is ridiculous. It strikes judges as ridiculous in part because most of us are either middle-aged or elderly men, in part because we tend to be snooty about popular culture, in

part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans—which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven—and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitutions mean what they say, and a striptease is not a speech. But the element of the ridiculous is not all on one side. Censorship of erotica is pretty ridiculous too. What kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque, as the statute requires? (These statutes are full of absurd locutions, such as: " 'Wholly or substantially exposed to public view,' as it pertains to breasts, shall mean. . . ." Chattanooga Ord. No. 7420, § 25-28.2(b), quoted in *City of Chattanooga v. McCoy*, *supra*, 645 S.W.2d at 401.) Most of us do not admire the Islamic clergy for their meticulous insistency on modesty in female dress. Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting. The history of censorship is a history of folly and cruelty.

Some two-party transactions have effects on third parties, and these effects are a proper object of public concern. Nonobscene displays of nudity can have such effects. *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625 (7th Cir. 1985), held that a public college could move an offensive although not obscene artistic display to a more discreet location where the display would not thrust itself on the unwilling viewer. Indiana can forbid the Kitty Kat Lounge to display photographs of its nude dancers on its marquee. But it cannot ban the dancing itself (when performed indoors, and not visible from the street) without a stronger showing of justification than it has attempted. Indeed, it has attempted none—which brings me to the brief and argument of the State of Indiana.

The brief is four and one-half double-spaced pages in length, and is replete with grammatical and typographical errors. It contains no explanation of the evil at which the statute is aimed, and its analysis of the constitutional question is limited essentially to the following passage: "Entertainment which did not contain expressive content—e.g., cockfighting or bear-baiting—could presumably be regulate [*sic*] or prohibited by the States. Entertainment per se is not protected; entertainment that is a form of expression is." It is not obvious, however, that just because people can be forbidden to incite animals to kill each other, striptease dancers can be forbidden to remove all their clothing. There is a missing link between blood sports and erotic dancing that the brief does not attempt to supply. A psychiatrist might find the juxtaposition fascinating.

Asked at argument to explain the concern behind the statute—a pertinent question because there is no legislative history, and the Indiana decisions interpreting the statute do not explain its purpose beyond vague references to public decency—the state's lawyer first suggested that the purpose might be the protection of marriage. But recalling the divorce rate in this country he quickly added that *that* battle had already been lost and he switched his ground to the prevention of adultery. This is farfetched and was not elaborated.

A related and more plausible concern that may lurk behind the statute is fear that striptease dancing in bars stimulates or facilitates prostitution. (Is the Kitty Kat Lounge in the red-light district of South Bend? Does South Bend *have* a red-light district? The record is silent on these questions.) The association between erotic dancing and prostitution goes back to Roman times; bump-and-grind dancing is said to have originated in the bordellos of the Wild West; and in *California v. La Rue*, 409 U.S. 109, 111 (1972), the Supreme Court, in upholding under the Twenty-First Amendment a California statute restricting nude dancing, cited evidence that nude dancing in

California bars had encouraged prostitution and other lewd conduct. See also *United States v. Muskovsky*, 863 F.2d 1319, 1321 (7th Cir. 1988); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 950-51 (11th Cir. 1982). The State of Indiana has never mentioned this evidence, however, let alone presented its own. Anyway the Indiana statute is not confined to bars. Although thus far I have discussed only the dancing at the Kitty Kat Lounge, because that is the only dancing that was videotaped for this case, the other plaintiff, Glen Theatres, owns a theater rather than a bar. The statute has been held to apply to theaters as well. *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), reversing 463 N.E.2d 1121 (Ind. App. 1984). If it were confined to establishments where liquor is sold, Indiana could appeal to the broad regulatory powers that states enjoy by virtue of section 2 of the Twenty-First Amendment, which forbids the transportation of alcoholic beverages into any state in violation of the state's laws. *California v. La Rue, supra*; *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam); *Reed v. Village of Shorewood, supra*, 704 F.2d at 950-51. The Supreme Court of North Dakota relied on that amendment in upholding an ordinance forbidding *all* dancing in places where liquor is served. *Olson v. City of West Fargo*, 305 N.W.2d 821, 827 (N. Dak. 1981).

Why the Twenty-First Amendment, the aim of which was to repeal Prohibition without eliminating state authority over the sale of liquor, should be thought to curtail the scope of the First Amendment is an abiding mystery of constitutional interpretation. The question is foreclosed at our level of the judiciary, however, and may in any event have little practical significance. For even if there were no Twenty-First Amendment, government would have greater scope for regulating expressive activity in bars than in theaters without violating the First Amendment. The audience is smaller, attentiveness is less, the expressive element diluted, and in short the social costs of restriction are lower. There are indications that the

Supreme Court would be receptive to a ruled based on such distinctions, *California v. La Rue, supra*, 409 U.S. at 118; *New York State Liquor Authority v. Bellanca, supra*, 452 U.S. at 722-23 (Stevens, J., dissenting), despite the social, cultural, and even political importance of cabaret entertainment. Segel, Turn-of-the-Century Cabaret (1987). And while in one sense the Indiana statute imposes an outright ban on an expressive activity rather than merely regulating it, in another sense the statute is a mere, and indeed modest (pun intended), regulation. The statute does not ban striptease dancing; it bans only striptease dancing that ends in nudity, which is so narrowly defined that a woman wearing only tiny "pasties" and a G-string is considered clothed. So perhaps it is merely the *manner* of the striptease that is being regulated, and regulations of the time, place, and manner of expressive activity are treated more leniently than outright bans.

But set to one side this question of which pigeonhole to put the statute in; it is another example of the frequent sterility of efforts at legal classification. Cf. *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1398-99 (D.C. Cir. 1990) (concurring opinion). Instead consider the issue in functional terms. The incremental expression associated with the movement from practical nudity to statutory nudity may well be slight, and the association of nude barroom dancing with prostitution may be a good enough reason for outlawing that increment to tip the balance in favor of a rule prohibiting nude dancing in bars but not in theaters, where the performers do not mingle with the customers. But that is not the approach of the Indiana statute. The statute does not distinguish between bars and theaters, and this omission, taken with the failure of the state in its briefs or at argument to mention prostitution, should make one skeptical that anxiety about prostitution is what animates it. Moreover, it is the striptease itself that the district judge found not to be expressive activity, not just the final step of

baring all. I add that despite the appeal of incremental analysis in this as in other settings, it would violate the First Amendment to require museums to place figleaves and brassières on their paintings and statues. Perhaps the Indiana statute effects a parallel mutilation of striptease dancing.

If we were dealing with a local ordinance, or a state statute authorizing local ordinances, the case for regulation would be strengthened. Even if one accepts the current view that the Fourteenth Amendment makes the prohibitions of the First Amendment fully applicable to the states and its subdivisions, the geographical scope of a restriction on expressive activity bears on the reasonableness of the restriction. Prostitution is a local problem, so the case for banning nude dancing in bars in order to reduce the incidence of prostitution will be stronger or weaker depending on local conditions. Moreover, an ordinance is less restrictive than a statute. It not only affects fewer people (on average—for of course there are some cities that are more populous than some states); it restricts them less. It is cheaper to travel to a nearby town for erotic entertainment than to another state.

In sum, while a *local* ordinance forbidding nude dancing and other nude performances in *bars* would be constitutionally unproblematic (nonexpressive public nudity in bars as in other places would fall under the legitimate ban of the state's statute) and would take care of the only social problem plausibly associated with nude dancing, a statewide ban on such dancing, applicable to theaters as well as to bars, violates the First Amendment. It is not saved by an exception for expressive dancing, when the exception excludes striptease dancing, which is expressive whether or not one likes what is being expressed. The intermediate regulation would be a statewide statute forbidding nude dancing (and other nude performances) in bars only; such a statute would be constitutional by virtue of the Twenty-First Amendment as it has been interpreted.

Can the application of the statute to dancing in theaters as well as in bars be saved by reference to the "general effect" of a regulation that restricts speech incidentally? *United States v. Albertini*, 472 U.S. 676, 688-89 (1985). In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the issue was the legality of a regulation of the National Park Service that forbade sleeping over in a number of the parks managed by the Service, including Lafayette Park in Washington, D.C., opposite the White House. No one questioned the validity of the regulation as such, but it was argued that the First Amendment forbade enforcing the regulation against a group that wanted to sleep over in Lafayette Park in order to make a symbolic statement about the problem of homeless people. The Supreme Court upheld the enforcement of the regulation even though in the particular case the balance between the values of expressive "speech" and those of cleanliness and order may well have inclined in favor of speech. The Park Service was not required to make an exception for the Community for Creative Non-Violence. *Id.* at 296-97. By analogy it can be argued that the State of Indiana is not required to make an exception to its ban on public nudity merely because the persons clamoring for the exception wish to employ nudity as an element of expressive activity.

Albertini and *Clark* make clear that persons engaged in expressive activity have no constitutional entitlement to be exempted from laws of general applicability. Authors cannot claim an exemption from income tax or publishers an exemption from the labor laws. This result is sound; and while it may be in tension with the principle derived from the free-exercise clause of the First Amendment that government must accommodate its laws of general applicability to the special needs of religious minorities, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that principle is moribund

after *Employment Division v. Smith*, 110 S. Ct. 1595 (1990). But the teachings of *Albertini* and *Clark* are inapplicable here. The regulations involved in those cases did not ban a particular form of expressive activity across the board but merely excluded it from certain public property (military bases in *Albertini*, certain public parks in *Clark*). And the harm to the policies behind the regulations was unaffected by the expressive character of the activities affected by them. In *Clark* for example, the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless. In contrast, whatever interest Indiana is trying to safeguard by banning public displays of nudity is not harmed by theatrical—perhaps not even by nightclub—performances featuring nudity. The harm done to public order by a performance of *Salome* in which Salome ends the Dance of the Seven Veils clad only in a transparent body stocking and therefore nude under Indiana law—as in a performance last fall at the Lyric Opera in Chicago—is not of the same order of magnitude as the harm (in fright, disgust, or embarrassment), slight as it may be, caused by a person who runs down the middle of a busy street stark naked or urinates in an alley. Only in the latter cases does the concept of public decency supply a persuasive rationale for punishment.

The bearing of *Albertini* and *Clark* on the present case is in any event academic. The defendants have not attempted to defend the district court's decision on the ground that all that is involved here is a refusal by Indiana to make an exception to a general prohibition of public nudity; they have not cited *Albertini* or *Clark*; they have waived the point. We can with propriety affirm a district court's decision "on any ground that the record fairly supports and the appellee has not waived," *Martinez v. United Automobile Workers*, 772 F.2d 348, 353

(7th Cir. 1985); *LaSalle National Bank v. General Mills Restaurant Group, Inc.*, 854 F.2d 1050, 1052 (7th Cir. 1988), but the second condition is not satisfied here. "A point raised for the first time at oral argument, when the appellant is in no position to reply, comes too late. We do not allow an appellant to raise new issues in the reply brief; perforce the appellee may not raise new issues at oral argument." *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989) (citation omitted). The appellees here never raised the issue.

Furthermore, whether or not required to do so by the First Amendment, Indiana has carved an exception to its public-decency statute for expressive activity. By interpreting the exception narrowly and thus the statute broadly, the district judge made the statute discriminate against a particular form of expressive activity—the "low" form represented by striptease dancing. And this a state surely cannot do without a reason.

The points about waiver and about the state's interpretation of the statute are connected. We are not the authoritative interpreters of a state statute; the state is. The state supreme court, in *Baysinger*, and the state's highest law enforcement official, in this case, concur in interpreting the statute not as a blanket prohibition of public nudity (an interpretation that the words of the statute would support), but as a prohibition of nonexpressive public nudity. That interpretation binds us, and demonstrates that what the state is doing is singling out a particular form of erotic but not obscene nude performance for condemnation. We would be inconsistent in affirming the district court's decision out of respect for popular preferences and states' rights while disregarding the meaning imprinted on the statute by the state's judges and law enforcement officials.

At oral argument the lawyer for the state said that the statute applies not only to live performances whether in

theaters or in bars but also to movies with nude scenes, unless of course the movie is "expressive" in the sense in which "established" works of art are expressive. (Owners of movie theaters in Indiana, beware!) He added that if the strippers ended their dances in bathing suits rather than in the buff, this would not affect the First Amendment issue, because the striptease would still be mere conduct. *This* statute would not apply, because a woman in a bathing suit is not within the statute's definition of nudity; but the statute could be amended to take her in without violating the First Amendment. (So we could have morals police patrolling the streets of South Bend with knouts, like the Saudis.) Belly dancing, he added, could be banned, presumably on the same theory—it is not certified high art. He reassured us that the nude paintings that hang in museums are safe, although he would acknowledge only a limited acquaintance with such museums. Recent events in a state bordering on Indiana make one wonder how safe even museums will be if the spirit of censorship is allowed to flourish.

I do not argue that legislation, to be valid, must have some empirical basis or serve some utilitarian end. The modern state is not forbidden to interfere with transactions between consenting, competent adults merely because it is unable to show that third parties are harmed. The state is free to embody in legislation the moral opinions of its dominant groups, or for that matter of any group influential with the legislature—is free, therefore, to make hostility to nonmarital sex, disgust at public displays of nudity, revulsion at vulgar erotic entertainment, and embarrassment at public displays of nudity premises of state action even though it is difficult to ground these moralistic emotions in pragmatic social concerns. Anxiety about nudity has deep roots in Christian thought, Brown, The Body and Society: Men, Women and Sexual Renunciation in Early Christianity 249, 437-38 (1988), and the roots of our culture are Christian. Hostility to public nudity may even be connected with concepts of dignity and

equality that are central to our political and social institutions. *Id.* at 316-17. But the state is free to act upon the moral preferences of the majority only up to the limits set by the federal Constitution. Those limits are not the sky when the activity restricted by state legislation is expressive activity in a sense that I believe encompasses erotic dance performances in general and the striptease in particular. The state can forbid nude dancing in bars if it acts under the Twenty-First Amendment, but if as here it wants to restrict such activity in all public establishments, whether or not they serve liquor, it needs a reason. *Krueger v. City of Pensacola*, 759 F.2d 851, 855-56 (11th Cir. 1985). It has offered none. Cf. *Mickens v. City of Kodiak*, 640 P.2d 818 (Ala. 1982).

Indiana's law enforcement authorities have been backed into an untenable position by the glosses that the courts of Indiana have placed on the statute, and are signaling to us by carefree advocacy their indifference to whether the statute survives or is struck down. (I *think* that is what they are doing, but I may be mistaken; the state did, after all, go to the bother of asking the full court to rehear the case.) In the America of 1990 the project of stamping out nude striptease dancing is quixotic. The power of government is relative to the desires and values of its people. The State of Indiana cannot take the erotic edge off American culture. I doubt that it is even trying to do so. But the sincerity of its concerns is easily tested. If the state is seriously concerned with the social consequences of nude barroom dancing, and does not trust its municipalities to deal adequately with the problem, it will amend its public-indecency statute to prohibit nude dancing in establishments that serve liquor. Such an amendment would be valid by virtue of the Twenty-First Amendment and would moot the questions that divide this court.

COFFEY, *Circuit Judge*, dissenting. The majority holds that the First Amendment forbids the State of Indiana from applying its prohibition on public nudity to nude dancing since "Indiana's attempt to ban nude dancing in pursuit of its [interest in public morality] is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse." Majority Opinion at 14. The majority reaches this result in spite of the fact that the plaintiff dancers made a clear and unambiguous statement that they were not attempting to convey either "a larger political or ideological statement" and furthermore the district court made a specific finding that the dancers' conduct was "not expressive activity." Further, as the majority admits, a state may "regulate expressive conduct for reasons unrelated to the suppression of speech," Majority Opinion at 15, and "may establish reasonable time, place and manner restrictions on protected expression." *Id.* The Indiana public nudity statute's application to the plaintiffs' nude dancing, like its application to any other form of public nudity, implements the state's interest in public morality, a legitimate and praiseworthy goal unrelated to speech and constitutes a valid regulation of the manner of any speech that allegedly inheres in the plaintiffs' nude dancing. I dissent.

Through the analytical vehicle of the "living constitution," the judiciary has all too frequently permitted the favored "rights" of particular individuals and groups to override a legislative majority's expression of the common good. Our society has evolved from one espousing strict moral standards to a rather uninhibited one. Under the flag of social and sexual individual freedom, advocates of such causes as the sexual revolution have utilized the judicial system to implement their Freudian vision of a society delivered from the legacy of repressed sexuality. Alleged First Amendment rights to the production and dissemination of sexually oriented tapes and books as well as substantive due process rights in the area of abortion, one of the most politically divisive questions of our time,

are a few of the currently recognized "constitutional" rights that would have proven very difficult to obtain through the popularly elected legislative branch. These developments certainly have led to the progressive disruption of the basic moral tenets that have held our communities together for centuries. Unsuccessful efforts at judicial expansion of constitutional rights, such as the failed attempt to erect a constitutional right to homosexual sodomy in *Bowers v. Hardwick*, 478 U.S. 186 (1986), testify to the persistent attempts to make use of the judiciary and the device of a "living constitution" to create a moral structure at odds with our Judaeo-Christian heritage. Indeed, an observer can discern from Justice Blackmun's dissent in *Hardwick* an attempt to develop a theoretical constitutional right "independently to define one's identity"[1] that would have, in essence, forbidden legislative action on any moral issue that could loosely be characterized as "victimless" (involving no clearly established damage to persons other than those who engaged in the activity). As the Supreme Court properly observed in rejecting this type of expansive jurisprudence in its majority opinion in *Bowers*: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." 478 U.S. at 194. Obviously, the framers of the Constitution and of the post-Civil War constitutional amendments never contemplated the type of "living" interpretation this document has received, including the present attempted recognition of constitutional protection for nude dancing. These individuals, who came from eras in which persons were fully clothed in public, certainly never contemplated, much less even dreamed, that the Constitution might someday be utilized as an instrument to promote nude dancing. What they had in mind when they left England for this country was the protection of religious exercise, freedom of press

[1] *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting), quoting *Roberts v. United States Jaycees*, 468 U.S. 608, 619 (1984).

and debate, not the expansion of a so-called "living constitution" to create a climate of moral permissiveness.

I am not one of those who believes that it is the role of the federal courts, through the creation of a "living constitution," to, in effect, establish a secular moral view that contributes to the piece-by-piece dismantling of our historic Judaeo-Christian principles and heritage. Expansive constitutional interpretation, centering upon the issue of expression in a case where the plaintiffs have disavowed any intention to communicate a "larger political or ideological statement" must not become a tool for a federal court to substitute the moral views of a more vocal minority for those of the majority of the people of the State of Indiana acting through their democratically elected representatives. If at all possible, the courts should give effect to the will of the people, even when it means upholding laws that express moral viewpoints that reflect a conception of the common good that may not be shared by segments of a vocal, so-called intellectual minority. This fact was most emphatically recognized in Chief Justice Rehnquist's opinion in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989), where the Supreme Court considered the legitimacy of state legislation pertinent to abortion, one of the significant issues of our day:

> "The dissent . . . accuses us, *inter alia*, of cowardice and illegitimacy in dealing with 'the most politically divisive domestic legal issue of our time.' There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti v. Franklin*, 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), and *Akron v. Akron Center for Reproductive Health, Inc.*, *supra*. But the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which

> the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today. The dissent's suggestion that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the dark ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them."

(Citations omitted).

I agree with the description of the judiciary's proper role expressed in Chief Justice Rehnquist's opinion. In the context of nude dancing, no less than in the contexts of abortion and other important questions of present concern, we are required to permit the people of each state to establish, through their democratically elected representatives, the moral climate in which they choose to live and raise their children. A state might well prefer a lifestyle that tolerates and perhaps even welcomes public nudity such as the likes of Las Vegas, San Francisco and others. So be it. People who seek this lifestyle are free to live in areas that cater to this moral climate. But many states, such as the State of Indiana, obviously wish a more wholesome lifestyle. If it so chooses, that state, through its duly elected representatives, should be entitled to create a cultural, ethical and moral environment above that which panders to the basest sexual appetites of human beings. Their right to select this type of environment should not be infringed upon, just as we would not infringe upon the right of other states to choose a more permissive environment. Community standards are a recognized part of the determination of whether dance is considered obscene and unprotected under the First Amendment. *See Miller v. California*, 413 U.S. 15, 24 (1973) ("The guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ."). They would seem

no less relevant to the issue of the legitimacy of restrictions on conduct unrelated to speech (i.e., nudity). Accordingly, it is important that we recognize that states and local communities through their legislative bodies are responsible for the establishment of moral standards that reflect their conception of the common good. It is not our role to elevate the interests of a few individuals, thereby stifling the will of the majority. For example, in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), the Court recognized the need to balance the interests of park users desiring highly amplified sound and park users who did not, rather than simply elevating the constitutional interests of the few over those of the majority, stating: "The City enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks may offer, from amplified music to silent meditation." *Ward*, 109 S. Ct. at 2757. Similarly, in upholding the strong interest of the majority of the people of Ohio in eradicating child pornography, the Supreme Court held that: "Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography," *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4470 (U.S. April 18, 1990), and noted that this action was distinguishable from its earlier decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), that recognized a right to privately possess adult, rather than child, pornography and obscene materials because *Stanley* itself recognized that " 'compelling reasons may exist for overriding the right of the individual to possess [certain statutorily prohibited] materials.' " *Osborne*, 58 U.S.L.W. at 4469 (quoting *Stanley*, 394 U.S. at 568 n.11).[2]

[2] In *Osborne* the Court believed this measure was necessary "because much of the child pornography market has been driven underground; as a result, it is difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." 58 U.S.L.W. at 4469. The Court also noted that "[i]t is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Id.*

It is self-evident that Indiana's public nudity statute is motivated by that state's legitimate concern for public morality. Both the majority opinion and Judge Posner's concurrence complain of the absence of legislative history accompanying the passage of the statute. *See* Majority Opinion at 14 ("Regrettably, Indiana does not record the legislative history of its statutes"); Posner concurrence at 39 ("Asked at argument to explain the concern behind the statute—a pertinent question because there is no legislative history . . . ."). But resort to legislative history to determine a legislature's intent in enacting a statute is unnecessary when the intent is clear from the statute's terms. As we recently stated in *Trustees of Iron Workers Local 473, Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir. 1989):

> "The resort to legislative history was unnecessary . . . because the statute is clear and unambiguous. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1547, 79 L. Ed. 2d 891 (1984) (where 'resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear'). . . . [T]he clear language should be the guide to congressional intent. Discarding the plain language of a statute in favor of committee reports or other legislative history ignores the realities of the legislative process. The crafting of specific language often reflects legislative compromise reached after hard fought battles over the means to reach even common goals. *Courts should only reluctantly turn to legislative history for fear of upsetting the delicate balance reflected in a finally worded piece of legislation. In this case 'the plain language' of the statute 'is the best evidence of its meaning.' Meredith* [*v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987)]."

(Citations and footnote omitted, emphasis added).

The fact that public morality underlies Indiana's enactment of a public nudity statute is abundantly clear from

the very language of the statute. For thousands of years people in Western cultures have consistently worn clothing in public, even from the time Adam and Eve wore the first fig leaves or loin cloths. It should not come as a shock that the sincerely held, traditional moral beliefs of the people of Indiana, would result in the enactment of a statutory requirement providing that at least a minimal amount of clothing be worn in public. Indeed, no fewer than 37 states have similar laws that prohibit indecent or lewd exposure of particular body parts.

Not only is the interest in public morality the self-evident basis for Indiana's public nudity statute, it is also an interest the Supreme Court has recognized as a legitimate justification for state regulation of conduct. For example, in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), the Supreme Court rejected the notion that traditional interests in public morality were insufficient to justify a state's prohibition of homosexual sodomy. The Court observed:

> *"[R]espondent asserts that there must be a rational basis for the law [against sodomy] and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.* Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis."

Bowers, 478 U.S. at 196 (footnote omitted, emphasis added). Similarly, Chief Justice Burger, in his concurrence in *Bowers* emphasized the legitimacy of traditional moral concepts as a basis for state regulation:

> "[T]he proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. *Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millenia of moral teaching.*
>
> *This is essentially not a question of personal 'preferences' but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here."*

Bowers, 478 U.S. at 196, 197 (Burger, C.J., concurring) (emphasis added).[3]

As well as improperly failing to recognize the legitimacy of Indiana's interest in public morality, the discussions of the state interest in "public morality" found in both the majority opinion and Judge Posner's concurrence demonstrate an inappropriately limited conception of this legitimate state interest. In belittling Indiana's interest in "public morality" Judge Posner states: "Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting." Posner concurrence at 38. Judge Posner's statement merely reflects differences in moral values among the population. Conduct that

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[3] *Hardwick* severely undercuts the persuasive authority of the Eleventh Circuit's decision in *Krueger v. City of Pensacola*, 759 F.2d 851, 855-56 (11th Cir. 1985), cited in Judge Posner's concurrence. *See* Posner concurrence at 47. *Krueger* predated *Hardwick*, was decided by the same court of appeals whose judgment was reversed in *Hardwick*, and its rationale that traditional moral concepts cannot provide a legitimate basis for state legislation is certainly inconsistent with the respect for such concepts the Supreme Court expressed in *Hardwick*.

a more vocal minority considers to be the work of "busybodies" reflects the implementation of the less vocal majority's deeply held concerns and should be respected. Personally, I do not mind being labeled a "busybody" or a "prude" as I write to uphold the moral ethics, ideals and principles of the majority of the people of the State of Indiana speaking through their legislative representatives. In writing along these lines, I would add that neither others nor myself are paternalistic or wish to force our moral beliefs on society. We merely recognize the right of the people, and in this instance the populace, of the State of Indiana to implement their beliefs and conceptions of proper moral principles through their legislature. This right I believe must be respected.

Furthermore, when a state bars public nudity, including nude dancing, on the basis of its concern for public morality, it does not act as a "busybody." Rather, it acts to eliminate the real harm that can result from permitting public nude dancing. The interest in public morality that Indiana relied upon to enact its public nudity statute is based on the simple truth that nudity, while appropriate and beautiful in some contexts may also prove deeply offensive and harmful in other contexts. An artist oftentimes finds it necessary in his or her profession to make use of a nude model, and nudity in that case is free from indecent connotations. Certainly, any form of nudity whose purpose and manifestation is the arousal of sexual fantasies among groups or in public lacks any qualification for social acceptance. Public nudity clearly breaks down the acceptable social norms that have evolved from our Judaeo-Christian foundation. Most importantly, a real consequence of nude dancing is the loss of human dignity for the female performer and sometimes even those who observe the performance. Traditional values and morals, as are expressed in Indiana's prohibitions of public nudity, far from being instruments of puritanical repression, are means for establishing complete and healthy integration of the human personality and thus preserve the dignity

of each and every individual, the primary requirement for wholesome social interaction.

The clearest way in which nude dancing harms the performers, the audience and society in general is through the degradation of women that results from their treatment solely as objects for lustful male sexual passions and appetites. When a woman is stripped of her clothing in the presence of a throng of observing males, we undeniably underscore the notion that a woman exists solely for the sexual satisfaction of a controlling group of males. In *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986), we noted the legitimacy of a city's concerns for the dignified treatment and respect for the female gender that motivated its adoption of anti-pornography legislation:

> "Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subject to rational study.

> Therefore, we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, '[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].' IND. CODE § 16-1(a)(2)."

(Footnotes omitted). Although we invalidated the Indianapolis legislation involved in *Hudnut* on the basis of viewpoint discrimination, 771 F.2d at 325, there was a clear recognition that the government's concern for the degrading effects pornography has upon women was a legitimate and proper basis for legislative action. This recognition was corroborated in the Final Report of the Attorney General's Commission on Pornography:

> "An enormous amount of the most sexually explicit material available, as well as much of the material that is somewhat less sexually explicit, is material that we would characterize as 'degrading,' the term we use to encompass the undeniably linked characteristics of degradation, domination, subordination, and humiliation. *The degradation we refer to is degradation of people, most often women, and here we are referring to material that, although not violent, depicts people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others, or that depicts people engaged in sexual practices that would to most people be considered humiliating.* Indeed, forms of degradation represent the largely predominant proportion of commercially available pornography."[4]

In the related area of child pornography, the Supreme Court has recently observed that: " 'The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.' " *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469 (U.S. April 18, 1990) (quoting *New York v. Ferber*, 458 U.S. 747, 758 (1982) (footnote omitted)). In light of the harm nude dancing causes to the female gender, including the psychological damage to performers that is so frequently a byproduct, I see no reason why the will of the people, expressed in the legislative branch, should not be permitted to prohibit this activity and overcome an alleged First Amendment right that is based on a foundation of quicksand.

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[4] Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 331-32 (1986) (emphasis added). The Attorney General's Commission went on to note that:

> "Although the category of the degrading is one that has only recently been isolated in some research, in the literature generally, and in public discussion of the issue, it is not a small category. If anything, it constitutes somewhere between the predominant and the overwhelming proportion of what is currently standard fare heterosexual pornography, and is a significant theme in a broader range of materials not commonly taken to be sexually explicit enough to be pornographic. But as with sexually violent materials, the extent of the effect of these degrading materials may not turn substantially on the amount of sexual explicitness once a threshold of undeniable sexual content is surpassed. The category therefore includes a great deal of what would not be considered to be pornographic, and includes a great deal of what would now be held to be legally obscene, but includes much more than that."

Id. at 334-35.

In my view the state's interest in protecting the welfare of its populace, including but not limited to the female entertainers, through a ban on nude dancing is both analogous to and more significant than the state's interest in animal welfare (prevention of the "torture and killing of animals") that Judge Posner would hold sufficient for the government to ban the allegedly expressive activity of bullfighting. Judge Posner notes that:

> "In calling bullfighting 'expressive,' I may seem to be implying, despite my disclaimer, that bullfighting *must* be protected by the First Amendment from regulation or suppression; for does not the amendment protect freedom of expression? I repeat that I do not believe that the First Amendment protects bullfighting. But I insist that bullfighting is an expressive activity. To deny this would be to play the unedifying semantic game called persuasive definition. Bullfighting is forbidden not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value."

Posner concurrence at 33 (emphasis in original). In the same way, I believe that the degradation of women involved in nude dancing constitutes a "harmful consequence" of this activity that "outweigh[s] its expressive value" and would allow the state in its legislative wisdom to act "to destroy a market for the exploitative use of"[5] women.

Not only does nude dancing in and of itself degrade women, its elimination is particularly important because of its close association with a more devastating example of sexual exploitation of women, prostitution. The link between nude dancing, prostitution and other sexual crimes is well established. It is common knowledge that prostitution is a likely result in a situation where live performers

[5] *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469 (U.S. April 18, 1990).

sexually stimulate an audience and there often exists the probability of audience access to these performers for the performance of sexual activities. As Judge Posner notes: "The association between erotic dancing and prostitution goes back to Roman times [and] bump-and-grind dancing is said to have originated in the bordellos of the Wild West . . . ." Posner concurrence at 39. We need go no further than our own cases to discover that nude dancing and prostitution are partners coupled not only logically and historically but also in empirical, present-day reality. We can properly take judicial notice that in no fewer than three of our decisions in the past two years prostitution operations have been based in nude dancing establishments. *See United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) ("Michael's Magic Touch served alcoholic beverages and entertained patrons with nude female dancers who, when not performing on stage, solicited the club's patrons to engage in sexual activities in rooms located above the club"); *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) ("The prostitution activities . . . were concentrated in three businesses that . . . were nude dancing establishments. . . ."); *United States v. Muskovsky*, 863 F.2d 1319, 1322 (7th Cir. 1988) (Prostitution operation based in nude dancing establishment where customers were enticed to purchase "very expensive drinks . . . in exchange for sexual favors"). *See also* 1 J. Weinstein and M. Berger, *Weinstein's Evidence*, ¶ 200[03] and 200[04] (Setting forth requirements for taking judicial notice of "legislative facts"). Furthermore, in *California v. LaRue*, 409 U.S. 109, 111 (1972), now Chief Justice Rehnquist described the prostitution and other sexual activities accompanying nude dancing that motivated a ban on nude dancing in California:

> "Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact be-

tween the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises."[6]

Thus, I agree with the observations of Justice Scalia that businesses, such as those that exhibit public nudity, are engaged in " 'the sordid business of pandering,' " *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 622 (1990) (Scalia, J., dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)), and that "[t]he Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, . . . live human nudity." *Id.* Although Judge Posner does not believe that the Indiana statute follows this approach, even he notes that:

"The incremental expression associated with the movement from practical nudity to statutory nudity may well be slight, and the association of nude barroom dancing with prostitution may be a good enough reason for outlawing that increment to tip the balance in favor of a rule prohibiting nude dancing in bars but not in theaters, where the performers do not mingle with the customers."

[6] In addition, the prostitution activity that so often accompanies nude dancing most assuredly provides a basis for the infiltration of organized crime into a community. For example, the Attorney General's Commission on Pornography noted: "Michael Joseph Glitta, one of the two major pornography distributors in Chicago, and a lieutenant in the Accardo organized crime family, controlled a "strip joint" where numerous persons have been arrested for prostitution-related offenses." Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 1059 (1986).

Posner concurrence at 41. In any event, it is quite clear, even in the concurring judge's opinion, that a limitation on public nudity, applicable to nude dancing, could serve a legitimate and proper interest in public morality through its suppression of prostitution.

Nude dancing can also raise danger for innocent persons, particularly women, who often find themselves victimized by those who have witnessed such performances. Certainly there is a powerful state interest in preventing sexual assault. Nude dancing, through its excitation of male sexual passions, might very logically result in a sexual assault. The Attorney General's Commission on Pornography specifically noted a relationship between exposure to exhibitions or material that degraded women and rape and other forms of unwanted sexual aggression:

"[O]n the basis of all the evidence we have considered, from all sources, and on the basis of our own insights and experiences, we believe we are justified in drawing the following conclusion: Over a large enough sample a population that believes that many women like to be raped, that believes that sexual violence or sexual coercion is often desired or appropriate, and that believes that sex offenders are less responsible for their acts, will commit more acts of sexual violence or sexual coercion than would a population holding these beliefs to a lesser extent.

We should make clear what we have concluded here. We are not saying that everyone exposed to material of this type has his attitude about sexual violence changed. We are saying only that the evidence supports the conclusion that substantial exposure to degrading material increases the likelihood for an individual and the incidence over a large population that these attitudinal changes will occur. And we are not saying that everyone with these attitudes will commit an act of sexual violence or sexual coercion. We are saying that such attitudes will increase the likelihood for an individual and the incidence for a

> population that acts of sexual violence, sexual coercion, or unwanted sexual aggression will occur. Thus, we conclude that substantial exposure to material of this type bears some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed."

Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 333-34 (1986).

Although rape and other unwanted sexual attentions are the most direct manner in which uninvolved women may find themselves harmed from exhibitions of nude dancing, the vicious and deprecating attitudes toward women that are developed as a result of nude dancing have the effect of perpetuating many forms of improper discrimination against women. As the Attorney General's Commission on Pornography noted:

> "We need mention as well that our focus on these more violent or more coercive forms of actual subordination of women should not diminish what we take to be a necessarily incorporated conclusion: Substantial exposure to materials of this type bears some causal relationship to the incidents of various nonviolent forms of discrimination against or subordination of women in our society. To the extent that these materials create or reinforce the view that women's function is disproportionately to satisfy the sexual needs of men, then the material will have pervasive effects on the treatment of women in society far beyond the incidence of identifiable acts of rape or other sexual violence. . . . [W]e feel confident in concluding that the view of women as available for sexual domination is one cause of that discrimination, and we feel confident as well in concluding that degrading material bears a causal relationship to the view that women ought to subordinate their own desires and beings to the sexual satisfaction of men."

Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 334 (1986).

While public nudity, including nude dancing, offends public morality in each of the ways previously enumerated, it also can result in other significant harm to public morality. In addition to spawning sexually related crime, nude dancing establishments are frequently magnets for crime in general. The Attorney General's Commission on Pornography has noted:

> "For many people the harms caused by pornography relate in part to the effects on communities and neighborhoods of the establishments in which such materials are commonly sold. Whether it be a peep show, an 'adults only' pornographic theater, or a so-called 'adult bookstore,' there seems widespread agreement that virtually all such establishments are largely detrimental to the neighborhoods in which they are located. . . . [S]uch establishments are likely to exist in close proximity to areas in which prostitution exists, and in close proximity to establishments such as bars featuring live sexually oriented entertainment. As a result, most people would consider such establishments environmentally detrimental, and there is some evidence indicating correlation between crime rates and the particular neighborhoods in which such establishments exist."

Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 385-86 (1986). Indeed, the Supreme Court has explicitly permitted zoning regulations impinging upon adult-oriented establishments because of this type of undesirable effect upon the neighborhoods in which they exist, holding that such an "ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult theaters." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986). Furthermore, in an era where sexually transmitted diseases such as Acquired Immunity Deficiency Syndrome (AIDS) are prevalent, it would seem apparent that nude dancing establishments, and their common side effects of prostitution and other sexually related crimes, would offend public morality and public health through

their effect upon the incidence of fatal and near fatal sexually transmitted disease.

In his concurrence Judge Posner essentially argues that Indiana cannot rely upon the broad conception of public morality that I have just considered, because it failed to verbalize all of these interests in its briefs and oral arguments in the current litigation. I disagree. As we have just developed, a state's interest in public morality is a many faceted interest designed to protect the citizenry from the psychological and physical harm that can result from public nudity, including nude dancing. As we have also developed, a legislature's intent to rely upon this multi-faceted interest is obvious in the very passage of a statute barring public nudity. In particular, the relationship between nude dancing and prostitution is so common knowledge that it is unnecessary for the legislature to specifically mention this concern and the alleged lack of legislative history is hardly worthy of comment. There is no doubt that Indiana's attorneys would have little problem in spelling out the state's interest in public morality in greater detail before this court, a situation we frequently overlook under the guise of judicial economy. This same comment might very well be made concerning many advocates who appear before us. However, I am unconvinced that their failure to explain in minute detail every aspect of the broad concern for public morality that legitimately motivates a ban on public nudity, applicable to nude dancing, should require a holding that Indiana did not, in fact, rely upon such a broad conception of public morality. These concerns should be self-evident to an educated man or woman unless we are intent on creating a red herring. In this regard, I would note that the insistence upon detailed legislative expression of every reason for Indiana's public nudity statute is distinctly at odds with the use of the concept of a "living constitution" that clearly departs from the intention of the Founding Fathers. Certainly the Founders lived in a society where people generally remained fully clothed in public and would have never even dreamed that the

constitutional right to freedom of expression included a freedom to dance unclothed in public. Yet, while there is a clear willingness to utilize the concept of a "living constitution" to permit any form of arguably expressive conduct to obtain First Amendment protection, there is a contrasting outright reluctance to give the same latitude to the interpretation of the legislature's interest in public morality. Because it is so obvious that clothing is normally required in a modern society, a state must not be required to undergo the time-wasting effort of explaining each and every self-evident reason why it is desirable to have the populace wear clothing in order for it to implement its interest in public morality through a prohibition on public nudity applicable to nude dancing.

I respectfully disagree with the majority's reply that the State's interest in public morality is insufficient to permit the application of the public nudity statute to the plaintiffs' nude dancing because the State's advancement of its interest in public morality "must operate within the proscriptions of the First Amendment," Majority Opinion at 14, and "Indiana's attempt to ban nude dancing in pursuit of [this] interest is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse." *Id.* (Footnote omitted).

We are concerned with an Indiana public nudity statute that has been declared valid on its face. *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), *appeal dismissed for want of a substantial federal question*, 446 U.S. 931 (1980). In a previous opinion we recognized the *Baysinger* holding as authoritative for purposes of this litigation. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288-90 (7th Cir. 1986). Thus, this is an "as applied" challenge where we are concerned *only* with the statute's application to the plaintiffs' activities. Therefore, we must "limit our analysis of the constitutionality of the [statute] to the concrete case before us," *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984), and speculation concerning whether or not the state might enforce this stat-

ute if the routines were "choreographed as part of a graduate Ph.D. thesis," Majority Opinion at 11,[7] if the nudity was in a "movie," Posner concurrence at 46, or in "belly dancing," *Id.*, is simply irrelevant. I also am at a loss to understand the relevance in these proceedings of Judge Posner's complaints that a statute violates the Constitution when it impermissibly discriminates against "a particular form of erotic but not obscene nude performance." Posner concurrence at 45. While all of these concerns might have been relevant to the earlier facial challenges to the public nudity statute, at this juncture of the litigation when we consider a challenge to the application of the statute to the conduct of these dancers we are concerned only with the statute's actual enforcement history. It is great to engage in academic speculation and theorizing about hypothetically possible applications of the public nudity statute that might or might not improperly restrict protected expression, but such speculation is inappropriate at this juncture of the litigation. Where, as here, the only concrete example of enforcement of the statute contained in the record involves the conduct of the plaintiffs, we are limited solely to consideration of whether their activities are constitutionally protected from the prohibition of public nudity contained in Indiana's facially valid statute. *See Vincent*, 466 U.S. at 803.[8]

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[7] Obviously if a dance was part of a graduate Ph.D. thesis, it would be accompanied by written argument (reasoning) explaining the ideas the dance conveyed, thus coming within the parameters of the First Amendment (expression). The expression involved in that situation contrasts sharply with our case where the dancers have, in my opinion, neither exhibited nor contended that their activities were intended to express any idea at all. *See* p. 71, *infra*.

[8] Applying "as applied" analysis, it would appear arguable that J. R.'s Kitty Kat Lounge and the dancers who appear there have no constitutional claim because their conduct was constitutionally unprotected since they attempted to conduct their nude dancing in a state-licensed bar serving alcoholic beverages in which nude

(Footnote continued on following page)

I agree with Judge Easterbrook's dissent in Section I wherein he considers how the application of Indiana's public nudity law to the nude dancing present in this case constitutes a permissible regulation of allegedly expressive conduct for reasons unrelated to speech and properly concludes that "laws against public nudity apply even if someone wishes to use nudity as an input into an expressive performance." Easterbrook dissent at 84. As explained hereafter, I also am convinced that Indiana's public nudity statute, which implements Indiana's legitimate interest in public morality, is a valid regulation of the dancer's conduct and of the *manner* of expression allegedly inherent in this activity.[9]

Indiana's public nudity statute is a restriction on the manner in which persons appear in public in the State of Indiana, applicable in public parks, streets and buildings, whether or not the involved individuals are engaged in allegedly expressive activity. The statute is similar to an indecent exposure prohibition and its very language makes clear that it is neither aimed toward nor limited to nude dancing, but rather prohibits nude dancing among other forms of indecent exposure such as "mooning," topless sunbathing, bottomless poetry recitation and any other activity, expressive or non-expressive, that results in public nudity. As even Judge Posner observes in his concurrence:

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[8] *continued*

dancing could be completely banned under the twenty-first amendment. *See City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam) (State "regulatory authority [under the Twenty-First Amendment] includes the power to ban nude dancing as part of a liquor license control program"). It is unnecessary to consider this possibility, however, because the Indiana public nudity statute can legitimately ban the nude dancing of all of the plaintiffs.

[9] This result is not surprising in light of the Supreme Court's recognition that the "standard of *United States v. O'Brien*, 391 U.S. 367 (1968), for validating a regulation of expressive conduct, . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

> "The [public nudity] statute does not ban striptease dancing; it bans only striptease dancing that ends in nudity, which is so narrowly defined that a woman wearing only tiny 'pasties' and a G-string is considered clothed. So perhaps it is merely the *manner* of the striptease that is being regulated, and regulations of the time, place, and manner of expressive activity are treated more leniently than outright bans."

Posner concurrence at 41 (emphasis in original). The Supreme Court has made clear that

> "even in a public forum the government may impose reasonable restrictions on the time, place, or *manner* of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' "

Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added)).

In applying the legal test applicable to a time, place or manner regulation, we begin with the question of whether the State's application of its public nudity statute to the plaintiffs is content neutral. The Supreme Court has stated:

> "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of

> expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.' *Community for Creative Non-Violence, supra*, 468 U.S. at 293, 104 S. Ct. at 3069 (emphasis added)."

Ward, 109 S. Ct. at 2754 (citations omitted).

The majority asserts that Indiana's application of its public nudity statute in furtherance of its goal of promoting public morality is not content neutral because: "In meeting this intended goal [public morality], the statute directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's prescribed vision." Majority Opinion at 15, n.7. The majority's statement is factually inaccurate because not one of the plaintiffs has ever asserted that her conduct was intended to convey any message, much less a message in opposition to the State of Indiana's vision of public morality. Section II-A of Judge Easterbrook's dissent effectively demonstrates that the district court determined that one dancer's true purpose was not to express any idea but "to try to get customers to like her so that they will buy more drinks later," while one other dancer featured an act with "no choreography," and was paid based upon "the number of drinks purchased." Easterbrook dissent at 85. As the counsel for one of the dancers stated at oral argument, and as Judge Easterbrook notes in his dissent:

> *"[T]here is not a larger political or ideological statement being made. I do not contend for a second that this is true. . . . I do not contend that there is some idea being expressed. We have said that in keeping with the language of the United States Supreme Court in Schad, that entertainment as well as political and ideological speech enjoys First Amendment protection. That's all we have ever said."*

Easterbrook dissent at 85 (emphasis added). Indeed, the questionable nature of any constitutional protection for any form of nude dancing was emphasized in the Sixth

Circuit's recent opinion in *Wal-Juice Bar, Inc. v. Elliott*, No. 88-3684 (6th Cir. April 5, 1990) (available on Westlaw at 1990 WL 37343), where the court observed that "the outright ban of nude dancing permitted under [*City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam)] and [*New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam)][10] rather plainly indicates that nude dancing is not a fundamental right entitled to heightened scrutiny under the due process clause." *Wal-Juice Bar*, Westlaw Printout at 12. This is a view that contrasts with that of the majority herein. The district court found that the dancers' conduct was "not expressive activity," and as I understand the law, we are bound to sustain district court findings of fact unless clearly erroneous. Federal Rule of Civil Procedure 52(a). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Similarly, "[w]hen there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. Thus, in light of the plaintiffs' counsel's clear statement that they were not communicating "a larger political or ideological statement," and the trial court's finding that the dancers' conduct "was not expressive activity," I am at a loss to understand how the majority can elect to come under the ever expanding umbrella of the "living constitution," cast aside the "clearly erroneous" standard of review, reach the conclusion that the plaintiffs sought to convey a message that opposed Indiana's concept of public morality and create another new and glorious First Amendment protection.

[10] Both *Iacobucci* and *Bellanca* were cases in which the Supreme Court recognized under the Twenty-First Amendment to the Constitution a broad state power to control nude dancing in establishments that served alcohol.

In the final analysis, however, it does not matter whether or not the plaintiffs sought to convey a message of opposition to Indiana's concepts of public morality. Indiana's public nudity statute is intended solely to ensure that neither expressive nor non-expressive conduct violates public morality, an interest wholly unrelated to the suppression of speech. The State of Indiana does not seek to muzzle the message of disagreement with its moral vision. The plaintiffs remain free to express opinions or to perform dance movements that would reflect their opposition to Indiana's vision of public morality. All Indiana requires is that in expressing any message they desire to convey, the plaintiffs abide by a requirement of wearing a minimal amount of clothing and covering that must be obeyed by both those who express opinions favoring and those who express opinions opposing the State's interest in public morality.[11] The Supreme Court has recently decided that the First Amendment does not compel an exemption from generally applicable criminal laws (drug laws) that incidentally affect the exercise of a liberty (free exercise of religion) protected under the First Amendment. *Employment Division, Oregon Department of Human Resources v. Smith*, 58 U.S.L.W. 4433 (U.S. April 17, 1990). As the Court noted, its "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a

[11] In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Supreme Court rejected a group of protesters' position that a governmental camping ban violated the First Amendment because it interfered with the expression that the protesters contended was present in their overnight residence in a symbolic tent city. The Supreme Court observed: "That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban [on overnight camping] any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Smith*, 58 U.S.L.W. at 4435 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). I am at a loss to be able to comprehend how the First Amendment provides a dancer's alleged exercise of a First Amendment right any greater freedom from generally applicable criminal laws than is enjoyed by an individual attempting to practice a First Amendment right to free exercise of religion. " ' "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." ' " *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469 (U.S. April 17, 1990) (quoting *New York v. Ferber*, 458 U.S. 747, 761-62 (1982) that quoted, in turn, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Although Indiana's public nudity regulation may have "an incidental effect" upon persons who attempt to incorporate nudity into expressive conduct, an effect not felt by others who fail to incorporate nudity into their expression, this "incidental effect" is clearly justified by Indiana's proper and admirable concern for the promotion of public morality in contrast to the State of Wisconsin.[12] This is a legitimate interest unrelated to the suppression of speech.

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[12] As Judge Posner stated in *Kucharek v. Hanaway*, No. 89-2885, slip op. at 11 (7th Cir. May 7, 1990):

> "No doubt it rather depreciates Wisconsin's commitment to extirpating obscenity to create an exemption of this sort; for imagine the hue and cry if Wisconsin exempted officials and employees of schools and public libraries from criminal liability for prostitution or rape. But this is a state that got along for eight years with no obscenity statute at all: the American Denmark. There are degrees of perceived criminal gravity, and apparently in Wisconsin obscenity is of not much more than zero degree. But Wisconsin can make its own judgment about the seriousness of obscenity as a social problem responsive to criminal punishment without encountering problems under the equal protection clause, and it ill becomes pornographers to complain about the leniency of an obscenity statute."

If the majority's view of the legal theory of content neutrality was controlling law a state could never regulate the time, place or manner of speech to further an interest unrelated to the suppression of speech because any attempt to enforce such a restriction would constitute the suppression of a "particular message contrary to the legislature's prescribed vision." This becomes especially clear when the majority's interpretation of content neutrality is applied to the facts of two recent cases in which the Supreme Court upheld governmental time, place or manner regulations. When the majority's interpretation of content neutrality is applied to the facts in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), a case where the Court held that the government's interest in a quiet park justified governmental restrictions on the volume of music performed in the park, the government's interest would be considered directly related to the suppression of speech because the musicians' loud music would express a message reflecting their opposition to this governmental interest. Similarly, when the majority's view of content neutrality is applied to *Frisby v. Schultz*, 487 U.S. 474 (1988), a case where the Court held that the government's interest in residential privacy justified a ban of targeted residential picketing, the government's interest would again be considered directly related to the suppression of speech because the picketers' expressive activity in the residential neighborhood expresses a message reflecting their opposition to this governmental interest. The Supreme Court's validation of the restrictions in both cases underscores the fallacious nature of the majority's interpretation of the concept of content neutrality.

Indiana's public nudity statute also "leave[s] open ample alternative channels of communication." *Ward*, 109 S. Ct. at 2753. The plaintiffs must only remain attired in the barest minimum of clothing during their dances, a requirement that hardly impedes the communication of the themes "of eroticism and sensuality"[13] that the majority believes

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[13] Majority Opinion at 11.

are found in the plaintiffs' conduct. Complete nudity is not indispensable to the plaintiffs' supposed message of "eroticism and sensuality," because there are myriad ways in which plaintiffs could communicate their erotic and sensual theme while clad in the minimal attire the State of Indiana requires under its public nudity statute. Indeed, strippers wearing proper coverings have long conveyed the alleged message of "eroticism and sensuality," that the majority has divined in the plaintiffs' conduct. Thus, "ample alternative channels" remain for the communication of any message the plaintiffs arguably wish to convey, although I would again point out that the plaintiffs have clearly stated that they have no intention of conveying or expressing any political or ideological message.

It remains necessary to determine whether Indiana's application of its public nudity statute to the plaintiffs' conduct is "narrowly tailored to serve a significant governmental interest." *Community for Creative Non-Violence*, 468 U.S. at 293. In *Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988), the Supreme Court made clear that this constitutional requirement does not turn upon whether a statute "bans" or merely "regulates" particular expressive activity:

> "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810, 104 S. Ct. 2118, 2130-2132, 80 L. Ed. 2d 772 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because 'the substantive evil—visual blight—[was] not merely a possible byproduct of the activity, but [was] created by the

> medium of expression itself.' *Id.* at 810, 104 S. Ct. at 2131."

Whether Indiana's public nudity statute is viewed as an "attempt to ban nude dancing," Majority Opinion at 14, or a mere attempt to regulate the nudity found in this alleged particular expressive activity,[14] the controlling question remains whether "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. In *Frisby* the Supreme Court concluded that

> "the 'evil' of targeted residential picketing, 'the very presence of an unwelcome visitor at the home,' *Carey* [*v. Brown*, 447 U.S. 455, 478 (1980)] (REHNQUIST, J., dissenting), is 'created by the medium of expression itself.' See *Taxpayers for Vincent*, 466 U.S. at 810, 104 S. Ct. at 2131. Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored."

Frisby, 487 U.S. at 487-88. Similarly, in our case the relevant substantive evil, the damage to public morality resulting from the violation of Indiana's well drafted statute barring public nudity, is not "merely a possible byproduct" of the plaintiff's nude dancing, but is "created by the medium of expression [nude dancing] itself." *See Taxpayers for Vincent*, 466 U.S. at 810. Thus, in applying its public nudity statute to proscribe the plaintiffs' public nudity the State has "target[ed] and eliminate[d] no more than the exact source of the 'evil' it [sought] to remedy," *Frisby*, 487 U.S. at 485, and has thus regulated in a manner "narrowly tailored to serve a significant governmental interest." *Community for Creative Non-Violence*, 468 U.S. at 293.

The application of the Indiana public nudity statute to the plaintiffs' nude dancing activities, as well as to nu-

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[14] *See generally* Posner concurrence at 41.

merous other nude activities, is nothing more than a permissible regulation of the manner of any expression that is arguably contained in this conduct. Expression is hardly impeded where the plaintiffs have stated emphatically that they were not conveying a "larger political or ideological statement" and were merely attempting to entice customers to purchase drinks. "[N]ude dancing is not a fundamental right entitled to heightened scrutiny. . . ." *Wal-Juice Bar*, Westlaw Printout at 12. Under no stretch of the imagination can the United States Constitution be considered to require an exemption to be carved from this statute to permit dancers in bars to flout the same prohibitions on public nudity that bind all others within the State of Indiana. I dissent and join Judge Manion's dissent as well as Sections I and III of Judge Easterbrook's dissent.

EASTERBROOK, *Circuit Judge*, with whom MANION and KANNE, *Circuit Judges*, join, and with whom COFFEY, *Circuit Judge*, joins with respect to Parts I and III, dissenting. Our court brands as unconstitutional a state law forbidding anyone to "[a]ppear[ ] in a state of nudity" in a "public place". Ind. Code §35-45-4-1(a)(3). The Supreme Court has sustained the application of this statute to bars. *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), appeal dismissed for want of a substantial federal question, 446 U.S. 931 (1980). The last time the case was here, we observed that *Baysinger* did not present a contention that barroom dancing is protected "expression", and we remanded so that the district judge could determine whether the dancers express something. 802 F.2d 287 (7th Cir. 1986). He found that they do not. 695 F. Supp. 414 (N.D. Ind. 1988). Today the court holds that expression is unnecessary, that *all* dance as entertainment is protected unless obscene.

I

Indiana does not regulate dancing. It regulates public nudity. The difference is dispositive for constitutional purposes even if one accepts the majority's conclusion that dancing is speech (the subject of Part II below). Nudity is conduct. Laws regulating conduct may apply to expression without violating the First Amendment. Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech. Unclothed dancing is a tiny fraction of the ambit of the rule, and what plaintiffs need is an exemption from a well-justified norm.

Conduct that plays a role in expression is not exempt from neutral regulation. Persons sought to sleep in the park, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (*CCNV*), to convey a message about homelessness. Nonetheless, the Court held, the Park Service may apply its regulation forbidding camping. Regulation of conduct is acceptable if it furthers an important interest that is "unrelated to the suppression of free expression". *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See also, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 778-79 (1990); *United States v. Albertini*, 472 U.S. 675 (1985). Burning a draft card in *O'Brien*, sleeping in *CCNV*, entering a military reservation in *Albertini*, boycotting criminal defense work in *Superior Court Trial Lawyers*, all were done to send a political message; although politics are the heart of the First Amendment, all of these messages were held subject to viewpoint-neutral regulation of the conduct. Cf. *University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 587-88 (1990) (EEOC may have access to university's tenure files under rules of general application notwithstanding possible burden on speech).

Indiana's reasons for prohibiting public nudity are "unrelated to the suppression of free expression". Its interest in attire is at least as great as the Park Service's interest in regulating catnaps, the subject of *CCNV*. Indiana need not prove that its interest in clothing is vital to welfare,

or disprove the plaintiffs' assertion that an exemption for barroom dancing would be harmless: "The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important governmental interests." *Albertini*, 472 U.S. at 688. The state's burden is especially light because the plaintiffs do not seek to transmit *any* message.

If Indiana forbade nudity *only* when employed in dance, then it would have a tough row to hoe. A dance-only law would be a regulation *of expression* if, as my colleagues believe, dance is speech. Regulation of expression faces high hurdles. The concurring opinion has things backwards in suggesting, slip op. 42, that a local law drawing a bead on nude dancing is easier to sustain than a state-wide ban on public nudity. If Indiana had targeted dancing, as the majority supposes, slip op. 14 n.7, I would be more sympathetic to its conclusion—although even then the state might have the power. States may prevent corporations from supporting candidates for public office, *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990). Can it be that nude dancing at the corporation's tavern has *greater* constitutional protection than the firm's political speech?

But Indiana didn't try to clamp down on dancing because of what it expresses. Erotic dance occurs at plaintiffs' establishments daily, without hindrance from Indiana. The state bans public nudity and no more. Streakers, flashers, mooners, nymphs who want all-over tans, and models wearing see-through blouses at trade shows to attract attention to machine tools are subject to the same rules. The law has nothing to do with the expression or viewpoint of the undressed person. On the supposition that nude dancing is "speech", this is dispositive. Under *CCNV*, *Superior Court Trial Lawyers*, and like cases, the state need not justify failure to *exclude* nude dancing from its general law directed to public nudity.

The concurring opinion maintains, slip op. 45, that Indiana's law is not neutral because the Supreme Court of Indiana held in *Baysinger* that the statute does not apply to speech. This approach would do away with the entire line of cases following *O'Brien*. A decision saying that a statute does not apply to protected expression recognizes the supremacy of the Constitution over state law; to acknowledge a limit the Constitution imposes on legislation is not to abandon the generality of the law. The rules concerning use of the parks at issue in *CCNV* had exceptions too; the Park Service did its best to accommodate expression, allowing the erection of symbolic tent cities, but drew the line at sleeping (which triggered the regulation forbidding "camping"). Government does not forfeit its entitlement to enforce laws regulating conduct by attempting to facilitate the expression of ideas.

Cases often say that regulation of conduct will be sustained when the governmental interest is sufficiently "important". Members of the majority say that Indiana's interest in clothing is tissue-thin. No case in the Supreme Court turns on a conclusion that the government's interest is inadequate. Whether judges should conduct such an inquiry at all when a neutral statute affects "expression" rather than "speech" is a question yet to be resolved. Judge Scalia's opinion in *CCNV*, which the Court cited approvingly in *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989), answers this question "no", and his assessment is persuasive.

> I start from the premise that when the Constitution said "speech" it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address "freedom of the press" separately—or, for that matter, "freedom of assembly," which was obviously directed at facilitating expression. The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication (which I will, for the sake of simplicity, refer to generically as "speech") even if they do so for purposes that have nothing

to do with communication, such as the suppression of noise or the elimination of litter. But to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of "making a point" is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate.

The cases find within the First Amendment some protection for "expressive conduct" apart from spoken and written thought. The nature and effect of that protection, however, is quite different from the guarantee of freedom of speech narrowly speaking. It involves a significantly different balancing of private rights and public interests, and does not always call for the detailed "First Amendment analysis" characteristic of the speech cases . . . . Specifically, what might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause. In other words, the only "First Amendment analysis" applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is a substantial justification for the proscription, just as it does in free-speech cases.

Thus, the First Amendment's protection of free *speech* invalidates laws that happen to inhibit speech even though they are directed at some other activity

(sound amplification, campaign contributions, littering). The more limited guarantee of freedom of expression, by contrast, does not apply to accidental intrusion upon expressiveness but only to purposeful restraint of expression. It would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists.

Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting) (emphasis in original, footnotes omitted), reversed, 468 U.S. 288 (1984).

Although the Court has not considered Judge Scalia's proposal for speech cases, it has adopted these views with respect to another part of the First Amendment, the Free Exercise Clause. *Employment Division v. Smith*, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990), holds that courts may not "balance" the public interest in the application of a statute neutral with respect to belief against the private party's interest in engaging in the forbidden activities. It wrote that the "government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " *Id.* at 4437, quoting from *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). Because the statute at hand forbade use of peyote without regard to smoker's motive, the Court held that there was no need even to consider how important the practice was to religion. Neutrality may not be a necessary condition of constitutionality, but it is a sufficient one.

So here. If we ask whether "the purpose of [Indiana's anti-nudity] law is to suppress communication", we must answer no. Ind. Code §35-45-4-1(a)(3) has nothing to do with speech, with expression, or with dancing—ballet, ballroom, or barroom varieties. It is indifferent to whether there is a message, or to the viewpoint expressed by any

message. It prohibits public nudity, leaving speakers ample methods to convey thoughts of all kinds. Laws preventing prostitution (sex for money) apply even if someone wants to film the act and use it in protected expression, as laws against bank robbery and murder mean that producers of *Bonnie and Clyde* had to fake robberies and deaths rather than shoot real ones. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330, 332 (7th Cir. 1985), affirmed, 475 U.S. 1001 (1986). In the same fashion, laws against public nudity apply even if someone wishes to use nudity as an input into an expressive performance.

The concurring opinion observes, slip op. 44-45, that Indiana did not rely on *O'Brien*, *CCNV*, *Albertini*, and similar cases. Usually that means waiver. The state loses its battle with Darlene Miller but retains the right to make its best arguments against other hoofers tomorrow. Yet neither the majority nor the concurrence grants the state this quarter. Both reject on the merits any possibility that Ind. Code §35-45-4-1(a)(3) is a neutral regulation of conduct. If we are to decide the *O'Brien* question rather than deem it waived, we should recognize that this line of cases vindicates Indiana's statute.

II

The majority writes for the most part as if Indiana had a law that zeroed in on the salacious aspects of nude dancing. Even such a statute, however, would be within its constitutional powers, for dancing is not "speech".

A

The court concludes that "non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment", slip op. 8. This dispenses with expression as an ingredient of speech, for the district judge found that there is no expression in these dances. With respect to plaintiff Miller, who dances at JR's Kitty Kat Lounge, the judge concluded:

> When she dances, Ms. Miller perceives herself as "just entertaining, just dancing". The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later.

Judge Sharp also adopted Judge Miller's findings concerning a similar act in the neighboring Ace-Hi Lounge:

> Ms. Jacobs dances for fifteen to twenty minutes as a juke box plays four songs. She buys outfits to wear when she dances, but her act consists of removing the outfits. Her act features no choreography; she simply takes the stage and dances. Ms. Jacobs believes she entertains the patrons in the establishment: they come in to see her, they applaud, they buy her drinks in appreciation of her performance. Her pay depends upon the number of drinks purchased, and she must sell a certain number of drinks to be paid.

Although characterization in First Amendment cases is open to reexamination on appeal, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion); *American Jewish Congress v. Chicago*, 827 F.2d 120, 129-30 (7th Cir. 1987) (dissenting opinion), findings of historical fact must be respected. Especially when the parties agree that they are correct. Miller's lawyer conceded at oral argument that she was not trying to express anything. Counsel stated:

> [T]here is not a larger political or ideological statement being made. I do not contend for a second that that is true. . . . I do not contend that there is some idea being expressed. We have said that in keeping with the language of the United States Supreme Court in *Schad*, that entertainment as well as political and ideological speech enjoys First Amendment protection. That's all we have ever said.

The court does not re-characterize the facts so much as say they are immaterial because dance is "inherently expressive" (slip op. 8). To the extent this means that professional choreography and staging are not essential, I agree.

To the extent we ask what something is "inherently", rather than whether real people are trying to communicate, I part company with the court because it effectively holds that all purposive conduct is speech. "Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. . . . [W]e decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it." *CCNV*, 468 U.S. at 293 n.5.

B

The First Amendment protects "the freedom of speech". Go-go dancing is not "speech". James Madison would have guffawed had anyone suggested public nudity as an example of "freedom of speech"—or of anything that could be derived from the Framers' conception by a series of plausible interpretations. Parading in a state of undress is conduct, not speech. Even Justices Black and Douglas, who thought the First Amendment absolute, rendering all efforts to curtail obscene speech unconstitutional, drew the line here. Dissenting in *Roth v. United States*, 354 U.S. 476, 512 (1957), Justice Douglas (joined by Justice Black) remarked: "I assume there is nothing in the Constitution which forbids Congress from using its power . . . to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." (Emphasis in original.) What these absolutists gave as a *reductio ad absurdum*, the court today holds the First Amendment commands.

"Speech" is of course one form of conduct, the creation and dissemination of oral and written symbols. Other forms of conduct also convey ideas. So there is no bright line between conduct and speech, and laws regulating conduct

may impede communication. What to do? The standard response is that "conduct" is treated as "speech" when it conveys a message, and regulation of this conduct fails when its application depends on that message. E.g., *Johnson*; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). These are separate inquiries: first the conduct must be designed to express something, and second the law's effect must turn on the viewpoint expressed. Applying a law banning nudity to striptease dancing does not create problems on either branch. Part I showed that Indiana's rule does not depend on viewpoint. Much closer is the question whether the plaintiffs' dances express something, to which I turn.

C

Communication is a subset of the universe of human behavior. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. "Speech" cannot be synonymous with purposive conduct, else the First Amendment means that "Congress shall make no law . . . abridging the freedom of conduct"—or, for short, "Congress shall make no law".

My colleagues take a wrong turn in discussing works of art, pictures in books, and other forms of communication. These are not "conduct". Although the Framers drafted a rule to govern political speech, see Leonard W. Levy, *Emergence of a Free Press* (1985); Alexander Meikeljohn, *Free Speech and its Relation to Self Government* (1948), for a long time (and for good reasons) judges have equated political and frivolous books, paintings, music, and other works of the mind that have been committed to parchment (or canvas, or celluloid, or vinyl, or today pitted aluminum on plastic). Rock music, *Penthouse* magazine, and "slasher" movies are speech; we needn't ask whether they are conduct *plus* expression. One need not divine the message of a painting to separate the conduct from the

speech; there is no "conduct" in it. In order to protect genuine speech from the censor, the definition of "obscenity" allows little room for regulation. Conduct may be regulated although not obscene. Our problem involves conduct, and to know whether to treat conduct *as* speech we must ask whether it shares the communicative aspect that led to the protection of *real* speech.

"In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Johnson*, 109 S. Ct. at 2539, quoting from *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). The district court found that the dancers are not trying to express an idea; the dancers agree. Our court does not say otherwise; it holds instead that a message is not necessary to expression because "eroticism and sensuality" (slip op. 11) automatically qualify as speech. Can other emotions be far behind? Despite the court's claim that its holding covers only "dance as entertainment", the majority does not identify any kind of entertainment that contains neither ideas nor emotions. Its rationale applies to entertainment en bloc.

Pervading this opinion is a belief that states may draw no lines where art is concerned. Sophisticates go to the museum and see Renoir's *Olympia* or to the opera and see a soprano strip during the Dance of the Seven Veils in Strauss' *Salome*. If the First Amendment protects these expressions, the argument goes, Joe Sixpack is entitled to see naked women gyrate in the pub. Slip op. 11, quoting from *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974). Why does this follow? That a dance in *Salome* expresses something does not imply that a dance in JR's Kitty Kat Lounge expresses something, any more than the fact that Tolstoy's *Anna Karenina* was a stinging attack on the Russian social order implies that the scratching of an illiterate is likely to undermine the Tsar. Rembrandt applied paint to canvas; a bucket of paint

hurled at a canvas also deposits paint. A conclusion that Rembrandt's paintings are speech would not imply that all paint is expressive. Juvenile delinquents who deface subway cars with spray paint may be "expressing themselves" in a colloquial sense, but they are not communicating ideas beyond their disdain for the sensibilities of others. The First Amendment does not let a government draw lines based on the viewpoint the performer expresses; it does inquire whether particular "entertainment" is "expression" in the first place. The Constitution does not protect "the freedom of entertainment". "Speech"—by implication "expression" of thoughts through conduct—is the foundation for its application.

Music is communicative or descriptive, and "*as a form of expression and communication*, is protected under the First Amendment." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (emphasis added). Bach's *Mass in B Minor*, Beethoven's *Pastoral (Sixth) Symphony*, Wagner's *Parsifal*, Mahler's *Resurrection (Second) Symphony*, the Beatles' *Sergeant Pepper's Lonely Hearts Club Band*, like other vocal, religious, and program music, tell stories—sometimes sexually explicit ones, as in Orff's *Carmina Burana*, which, if it were not sung in Latin, could not be put on the airwaves. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). People may fairly dispute whether absolute music, such as LaMonte Young's *Well-Tuned Piano*, communicates thoughts, but surely it embodies them (the right place for the major third, etc.); all that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. It has the "capacity to appeal to the intellect", *Ward*, 109 S. Ct. at 2753, is not "conduct", and is closer to speech (even an emotional harangue is speech) than to smashing a Ming vase or kicking a cat, two other ways to express emotion.

Like mimes, ballets tell stories, often erotic stories, and clothing (or lack of it) may help the tale unfold. No one can miss the sensual message in Stravinsky's *Le Sacre du Printemps* or the fairy tale in Tchaikovsky's *Nutcracker*. Ballet rarely approaches absolute music in ab-

straction. Even Balanchine's choreography to Stravinsky's *Agon*, a model of spare movement, does not suppress the contest to which the title refers. People objected to Nijinsky and Isadora Duncan because of the message rather than the medium.

One could try reductionism, but it would fail. All music is rhythmic pressure on the eardrum. Mozart's string quartets, jackhammers, and humpback whales all produce rhythmic compressions. Yet Mozart's music is profound, jackhammers are the sound of progress but express nothing beyond what they do, and whale song, for all its haunting beauty, has only the message the listener supplies. Laws muffling jackhammers, or allowing the hunting of whales, do not violate the First Amendment.

To say that the line between barroom dancing and ballet is indistinct is not to say that no state may recognize the difference: "[W]e would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries [nude barroom dancing!] that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *California v. LaRue*, 409 U.S. 109, 118 (1973). The line separating photos that are obscene from those the Constitution protects depends in part on whether the work, "taken as a whole, lacks serious literary, artistic, political or scientific value", *Miller v. California*, 413 U.S. 15, 24 (1973). So the Court believes that the Constitution allows states to distinguish serious art from swill. Nude barroom dancing lacks "serious literary, artistic, political or scientific value". If it were *real* speech it would not be obscene (it is too mild to satisfy the rest of the *Miller* test), but the lack of "serious . . . artistic . . . value" assures us that Indiana is not squelching important aspects of culture.

Why is it important that the plaintiffs dance? The court uses a definition of dancing ("moving the body in a rhythmical way, usually to music", slip op. 9) broad enough to

cover most physical activity. Swimmers, roller skaters, ice skaters, walkers, skateboarders, matadors, and construction workers using jackhammers move rhythmically, often to music. The majority believes that "the communication of emotion *or* ideas" (*ibid.*, emphasis added) is protected by the First Amendment. Many things other than dance, or entertainment, or dance-as-entertainment, express "emotion". Quarterbacks who throw touchdown passes exude emotion. Consistent application of the majority's approach prevents it from limiting constitutional protection to "dance as entertainment".

What of flashers, whose "message" scarcely differs from nude dancers'? Imagine an organized flasher, shucking his coat in a booth next to the hot dog vendor and adding a boom box and hip motions. This is "dance" as my colleagues use that word. If dance is "inherently" expressive then the flasher's act is speech; it can't matter that the display takes place outdoors, or that the customers gawk for free. Flashers affront an unwilling audience, yet speech is protected even when listeners are revolted, *Cohen v. California*, 403 U.S. 15, 21 (1971). Courts holding that nude dance is protected speech when the dancers are indoors, and the customers pay to watch, but not otherwise, e.g., *International Food & Beverage Systems v. Ft. Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (which the majority quotes approvingly at slip op. 12), offer no principle by which "expression" turns on the existence of walls, or the solvency or approval of the audience. See *Erznoznik v. Jacksonville*, 422 U.S. 405 (1975) (drive-in movie is protected speech despite fact that unwilling people see, and drivers may be distracted by, the images).

Barroom displays are to ballet as white noise is to music. We know that sexual congress is not protected by the First Amendment, whether offered to the public as entertainment, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973), or sold in a spot market, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). Sex may be entertaining and is at least as expressive as nude go-go dancing. Because the patrons do not fondle the dancers, our

case is not *Arcara*, but this distinction is unrelated to expression. (Indeed, on the majority's view "lap dancing", a form of fondling, also might be protected speech, because it too expresses the joy of sex and involves "moving the body in a rhythmical way, usually to music".)

If the First Amendment covers entertainment, how ought we treat bullfighting, unlawful throughout this nation but popular in many others? The matador "entertains" no less than the stripper and "expresses" more. Bullfighting is a form of dance, with elaborate choreography and messages clearly perceived by the spectators. Indiana does not offer even a "time, place, and manner" for the sport. If it were to add baseball or checkers to the list of forbidden pleasures, or if Congress were to black out telecasts of football games when the stadiums do not sell out (it has), objections could not be based on the First Amendment.

No one can escape the bullfighting problem by saying that it involves cruelty to animals, which state laws forbid. E.g., Ind. Code §35-46-3-12(1). That is not the only reason we forbid such spectacles. "Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles." Irving Kristol, *On the Democratic Idea in America* 33 (1972). One may say the same for striptease dancing. Anyway, the question is whether the matador is speaking—whether the First Amendment *applies*—not whether the state's claim to regulate surmounts that hurdle. Despite its refrain that the opinion is limited to dance as entertainment, the court's approach means that bullfighting is speech. If so, it is hard to see on what ground a state may forbid bullfighting. Speech is protected even when it produces risks to people, as in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Hudnut*, 771 F.2d at 328-30. I cannot accept a rationale implying that a state may muffle speech to promote the welfare of bulls but not to promote the welfare of blacks (*Brandenburg*) or women (*Hudnut*).

D

We are told that however wide the gulf between striptease dancing and the *Federalist Papers*, the Rubicon was crossed in *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981). It wasn't. *Schad* dealt with a zoning ordinance that forbade all live entertainment. This barred the town gates to Dylan Thomas's *Under Milkwood* as well as to plays and other forms of speech. The Court held it overbroad. By dismissing the appeal in *Baysinger*, the Court has already held that Indiana's public nudity statute is not overbroad.

Although the laws have nothing in common, *Schad* contains language that has been taken to resolve the question before us.

> By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.

Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment. Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own.

452 U.S. at 65-66 (citations and footnote omitted). Culling this passage and adding ellipsis can produce phrases such as "nude dancing . . . [is] rooted in the First Amendment", but this is not the Court's point. It tells us that a "wide range *of expression*" is protected, and that " '[n]udity alone' does not place *otherwise protected* material outside the mantle of the First Amendment". Conduct gets to *be* "otherwise protected", however, by having an element of "expression". So nudity at the end of *Hair* does not withdraw the protection for the political expression that dominates that play, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Nudity in a ballet expressing ideas would not remove it from the realm of speech. These principles do not aid the plaintiffs today, however, for they have not established that they are engaged in "expression".

Cases such as *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), are no more helpful: "[a]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment *might* be entitled to First and Fourteenth Amendment protection *under some circumstances*." (Citation omitted, emphasis added.) Under *what* circumstances? When it communicates something, I should think. *FW/PBS, Inc. v. Dallas*, 110 S. Ct. 596 (1990), is even less aid to the plaintiffs, for there the city conceded that nude dancing is speech, and "[i]t is [the] Court's practice to decline to review those issues neither pressed nor passed upon" in the court of appeals. *Id.* at 604.

To the extent *Schad* and *Doran* offer guidance, the Court's resort to overbreadth analysis implies that nude dancing is not always clothed with expression. Overbreadth is a special doctrine entitling someone whose words or deeds could be regulated or even proscribed to prevail on the ground that as applied to someone else the law prohibits protected speech. Schad offered live nude dancing to his patrons. If nude dancing is expression, or if all entertainment is protected speech, it would have been

simple to say: "Schad offers entertainment, which the borough forbids; therefore the law is unconstitutional." Instead the Court said that "*[w]hatever* First Amendment protection should be extended to nude dancing", Schad's "claims" (not the nudity) were sufficiently rooted in the First Amendment that he could contest the application of the ordinance to "the expressive activities of others". Only three weeks later, Justice Stevens remarked that although the Court has "written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question". *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718-19 (1981) (dissenting opinion). Justice White, the author of *Schad*, concluded four years ago that the status of nude dancing remains unsettled. *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (dissenting from the denial of certiorari). Nothing since then changes that assessment.

Dallas v. Stanglin, 109 S. Ct. 1591, 1595 (1989), comes closest to our problem. It holds that social dancing is *not* "expressive activity . . . protected by the First Amendment." How is nude barroom dancing different from social ballroom dancing? The court does not say; it does not mention *Stanglin*. The concurring opinion suggests (slip op. 22) that the difference lies in performance: social dancing is like "casual chit-chat", not the kind of "statement" that the First Amendment protects. The majority does not embrace this, for good reason. The sole case on which the concurring opinion relies arises out of public employment. Employees who go to work for the government surrender rights to speak to the extent necessary to allow the government to function. E.g., *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Snepp v. United States*, 444 U.S. 507 (1980). Even in the public employee cases an audience is not essential to constitutional protection. *Rankin v. McPherson*, 483 U.S. 378 (1987). See also, e.g., *Norwell v. Cincinnati*, 414 U.S. 14 (1973) (insulting language to a police officer's face). Congress could not imprison anyone on account of words of endearment whispered in the ear

of a loved one. If privacy of speech does not blot out the First Amendment, then the difference between the brazen display of barroom dancing and the subdued display of ballroom dancing cannot reconcile this case with *Stanglin*. Perhaps, then, the concurring view depends on the principle that "low value" speech of all kinds is unprotected. Yet what keeps nude barroom dancing out of that category?

A line that distinguishes barroom dancing (protected) from ballroom dancing (unprotected) has little vitrue other than avoiding inconvenient precedent such as *Stanglin*. If the "expression" in barroom dancing lies, as my colleagues believe, slip op. 11-12, in a celebration of sex, conveying the pleasure dancers take in sensuality, social dancing is the more expressive. Barroom dancers feign emotion; ballroom dancers express the real thing. So if precedent is what drives our court today, the most powerful case is *Stanglin*, which undermines the majority's conclusion.

E

Speech versus conduct is not only the First Amendment's line but also a distinction essential to democratic governance. People act for reasons. Acts therefore imply the virtue or import of these reasons. And if some people, such as the dancers in JR's Kitty Kat Lounge, believe that their autonomic nervous systems are in charge, so that they have no message, Sigmund Freud will correct them. Even in a quantum-mechanical universe there are reasons, and clever observers can infer messages having nothing to do with the id and the superego. A driver doing 90 in a school zone makes an implicit proposal to change the speeding laws, or comments on the dominance of man over machine, or declaims the low value of children's lives, or advertises the capabilities of the car. So too we attribute to nude dancing a belief in the value of Eros, or a retelling of the Genesis story, or a burst of lustful emotion. If that strains credulity we may consult the books. Persons wanted to sleep in the national parks in *CCNV* to show that the high price of housing bred homelessness; strippers protest the high cost of clothing.

This is clever invention, too clever for constitutional adjudication. Neither the dancers nor their lawyers came up with a message in five years of litigation. That well-read judges can tease out of dancers' acts thoughts the dancers never had, and divine in a rule requiring opaque covering of the nipples a threat to the display of Aubrey Beardsley's prints, shows the importance of drawing lines rather than the need to obliterate them. "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Stanglin*, 109 S. Ct. at 1595.

Transmogrifying conduct into speech thrusts courts into the business of substantive due process. For if entertainment is speech, then it is subject only to "reasonable time, place, and manner restrictions". "Reasonable" is the key word. Legislatures bear the burden of showing that the regulation is reasonable. What is "reasonable", except what is wise? Assessing the wisdom of legislation is the program of *Lochner*. It failed when applied to wages and hours laws and is no more suited to nude dancing. "Reasonableness" is not a standard, not law at all. John Hart Ely, *Democracy and Distrust* 111-16 (1980); T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 Yale L.J. 943, 966-68, 976-79, 984-95 (1987). When courts assess the "reasonableness" of legislation, they and not the elected legislators are the real policy-makers.

Preserving the spheres of judicial and political decision is not "abdication of [judicial] responsibility", slip op. 8 n.4. You can't "abdicate" a power you do not possess. When deciding whether judicial power *exists* a court must recognize the importance of preserving distinctive political and judicial roles. If nude dancing is "speech" it is so by the barest margin; someone standing at the center of the First Amendment (political speech) would need binoculars to see this far into the periphery. Judges should not establish rules that "disserve[ ] principles of democratic self-governance", *Garcia v. San Antonio Metropolitan Transit*

Authority, 469 U.S. 528, 547 (1985). "Values that are protected against governmental interference through enshrinement in the Bill of Rights are not thereby banished from the political process", *Employment Division v. Smith*, 58 U.S.L.W. at 4438, and judges must respect the boundary between that process and the domain of law. Concern about the limits of *judicial* power, about the authority for an official with life tenure to countermand a decision of the elected legislature, must be at the forefront in every constitutional case. Article III does not commit to federal courts the resolution of all questions about the wisdom of rules. *Allen v. Wright*, 468 U.S. 737, 750-53 (1984); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984); *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979); *TVA v. Hill*, 437 U.S. 153, 195 (1978). Yet it is exactly that power we claim in first treating conduct as "speech" and then saying that only "reasonable" regulation is allowed. The First Amendment is designed to get government out of the business of regulating speech while preserving to legislators freedom to act with respect to other human affairs. The court's two-step, by contrast, treats conduct as speech yet asserts a broad power to regulate speech ("reasonably", of course) and means that fundamental decisions about legislation of all kinds vest in the judiciary.

Judges avoid this by insisting on categorical rules. "Conduct" and "speech" are the principal categories, and observing that distinction is essential if we wish to maintain the boundary between legislative and judicial roles in a democratic society. Any sentient being knows that categories are imperfect. Lawyers are trained to disparage line-drawing by showing that no matter where the line goes you can frame essentially indistinguishable cases on either side. Such a line is nonsensical!, comes the *coupe de grace*. The exercise is child's play in the domain of art and entertainment, for "what is art?" is a question unanswered for centuries. Albrecht Drer and a vandal wielding a can of spray paint have *some* things (paint, surfaces, emotions) in common. Yet the extremes are distinctive,

and the difference permits a line even though other cases are much closer. Cf. *United States v. Powell*, 423 U.S. 87, 93 (1975).

Political society depends on stable lines to govern a world of continuums. Anything else transfers the locus of power. Judges who see the many facets of a subject, who know that just as a line cannot bisect a sphere so no one-dimensional rule can partition a multi-dimensional world, also must understand the role lines play in governance and the allocation of functions. Complex reality mocks rules, yet we must deny ourselves the comfort of requiring the law to match the universe. Holmes understood this. *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 23 (1930); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). An era of balancing has obscured this message, but it is no less important today. See *Employment Division v. Smith*, 58 U.S.L.W. at 4438 n.5: it is "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice"—or, I should think, the significance of nudity to a dance.

III

If go-go dancing were "expression", and *if* dancers regularly undressed during the bacchanal in the third act of Saint-Saëns' *Samson et Dalila* without objection from Indiana, we would have an interesting case. So far as this record reveals, however, there is neither expression nor unequal enforcement according to viewpoint. An officer told the judge that he had never arrested a ballet dancer for nudity, but nothing in the record suggests that ballet dancers pirouette without tutus in his jurisdiction.

Statutes may express moral views about how the community should live. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Paris Adult Theatre I*, 413 U.S. at 57-63; *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.). Much law is based on nothing other than moral

views. Sometimes morality combines with instrumental concerns. We accepted as adequate to support legislation the belief that displaying women in a sexually submissive way shapes social patterns to women's detriment. *Hudnut*, 771 F.2d at 328-30. This court held Indianapolis's ordinance unconstitutional only because it distinguished on account of the speaker's viewpoint. Many of the justifications advanced for the Indianapolis ordinance could be offered for restrictions on displays in pubs. Cf. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Because the public nudity law does not discriminate on account of viewpoint, it does not have the defect that lead to invalidity in *Hudnut*.

Maybe all of this is rationalization of a law that has no effects beyond depriving *hoi polloi* of a harmless pastime. Maybe not. Ours is not the decision. States may offer different social climates from which the people may select. Indiana has one, Illinois another. Society is the richer when choices increase.

Darlene Miller wants to impress the barflies so they will ply her with drinks. She believes that the impression made by her act varies inversely with the amount of clothing she wears. She is the best judge of her self-interest, but this has nothing to do with the First Amendment. We may doubt the wisdom of requiring women to wear more clothing in the bars of South Bend than in the *Folies Bergère* or on the beaches of Rio de Janeiro without concluding that Indiana has exceeded its powers under the Constitution.

MANION, *Circuit Judge*, with whom COFFEY and EASTERBROOK, *Circuit Judges*, join, dissenting. Today this court holds that "freedom of speech" protects public, nonverbal, nude dancing that communicates no ideas and is considered harmful. Not surprisingly, in their briefs and at oral argument the parties never discussed the text of the First Amendment. Perhaps this is because everyone knows that "Congress shall make no law . . . abridging the freedom of speech"; more likely, it is because reference to the text is a stark reminder of how far First Amendment jurisprudence has gone astray.

Miller should not prevail for two reasons. First, the district court found that the nude dancing at issue contained no "expressive activity." At oral argument Miller's attorney admitted that this dancing communicated no idea or message. The district court's finding was not clearly erroneous, and we should affirm on that basis.[1]

Second, assuming for the sake of argument that striptease contains an expressive element, this statute is valid because the state interest in preventing public nudity—an interest unrelated to the suppression of speech—outweighs whatever expressive elements are contained in a striptease. The majority, by its emphasis on dance, disregards the fact that the challenged statute is not directed at dance but at public indecency, including "appear[ing] in a state of nudity" in a public place. Public nudity is conduct, and is prohibited in every state. Striptease dancers who remove all their clothing become nude in

[1] This is not at odds with Supreme Court precedent. The Supreme Court specifically has declined to rule on the scope of First Amendment protection to be afforded nude dancing. See *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J., dissenting from the denial of certiorari). In *California v. LaRue*, 409 U.S. 109, 117-18 (1972), the Court made clear that conduct such as nude dancing is protected by the First Amendment only when there is a "communicative element," citing *U.S. v. O'Brien*, 391 U.S. 367 (1968). See dissenting opinion of Judge Easterbrook at 93-96.

public, and their conduct violates the statute.[2] The Supreme Court has upheld other content-neutral regulations even though the speech in those cases was much closer to the core of First Amendment protected activity than nude dancing. See *U.S. v. O'Brien*, 391 U.S. 367 (1968) (political protest to the military draft); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (political protest relating to homelessness). Here the state's valid interest in preserving public morality justifies this statute despite its incidental impact on the "limited" First Amendment interests the majority believes are inherent in nude dancing. Majority op. at 8.

The majority finds expression that not even Miller's counsel much less the district court could find. Majority op. at 12. Although we must not ignore original meaning when applying constitutional provisions, we nevertheless cannot turn back the evolutionary clock, powered by case-

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[2] Public nudity statutes—"indecent exposure" laws—of the type challenged here are widely accepted and usually upheld, even when the challenge is grounded in the First Amendment. See *South Florida Free Beaches v. City of Miami*, 734 F.2d 608 (11th Cir. 1984) (nude sunbathers' argument that state law and city ordinances prohibiting public nudity violated their First Amendment right to demonstrate that "the human body is wholesome and that nudity is not indecent" rejected because the First Amendment does not protect nudity unless combined with some "mode of expression" entitled to First Amendment protection); *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976) (nude sunbathing in a national park not protected); *Craft v. Hodel*, 683 F.Supp. 289 (D. Mass. 1988) (women who bared breasts in a political protest of alleged unequal treatment and exploitation of women not protected by First Amendment); *Chapin v. Town of Southampton*, 457 F.Supp. 1170 (E.D.N.Y. 1978) (no First Amendment protection for nude sunbathers who sought to communicate ideas); *Alexander v. Severson*, 408 N.W.2d 195 (Minn. App. 1987) (owner of adult bookstore featuring "exotic dancers" not entitled to injunction to prevent City of Minneapolis from enforcing its indecent conduct ordinance against dancers because no testimony "suggested an attempt to convey ideas" in the dancing); *State v. Turner*, 382 N.W.2d 252 (Minn. App. 1986) (nude sunbathing).

law, that has enlarged the circle of protection of the First Amendment. But we still should consider original meaning if we are to avoid enlarging this circle even more.

In his concurrence, Judge Posner suggests that "original understanding as a guide to constitutional interpretation" changes the Constitution from a "living document" into a "petrified reminder of the limits of human foresight." Concurring op. at 29. Fortunately, with great foresight the framers of the Constitution enacted Article V, which allows adequate "life support" through the amendment process. It takes little foresight to realize that three-fourths of state legislatures would not ratify a Twenty-seventh Amendment that stated "the right of citizens of the United States to entertain by dancing nude in public shall not be denied or abridged by the United States or by any state." It is a much simpler process for a handful of judges to protect nude dancing as entertainment by calling it speech.

Nothing in the Constitution *prohibits* public nudity. Modern legislatures make those decisions in response to the desires of the people. The Constitution grants broad power to legislatures in part because they are best able to respond to changing times and social mores. Legislatures are always free to create new liberties by repealing outdated legislation or passing new laws, and the Constitution has nothing to say about it.

Judge Posner observes that in 1990 America "the project of stamping out nude striptease dancing is quixotic. The power of government is relative to the desires and values of its people. The State of Indiana cannot take the erotic edge off American culture. I doubt that it is even trying to do so." Concurring op. at 47. It should be apparent that the elected representatives of the people of Indiana are much better suited to determining "the desires and values" of their people than those of us who sit on this court. We must assume that if Indiana did not believe nude dancing was a problem, its public nudity statute would be repealed, or at least not used against nude barroom dancing.

This court's decision stands only for the proposition that we know better than the people of Indiana. Nude dancing ought to be legal, therefore it must be protected by the Constitution. At least Judge Posner's concurrence is straightforward:

> Censorship of erotica is pretty ridiculous too. What kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque, as the statute requires? . . . Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting.

Concurring op. at 38. While that may be true, legislative busybodies can be tossed out of office at the next election. We judges have lifetime insulation from such harsh realities. But since the question is raised, what power does a state have to regulate public morals: what motivates these "busybodies"? Perhaps we should begin where Judge Posner left off—"the power of government is relative to the desires and values of its people." Concurring op. at 47.

Even when First Amendment interests are present the Supreme Court always has recognized the authority of the state to legislate in the interest of protecting community morals. And "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *California v. LaRue*, 409 U.S. 109, 117 (1972).

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), when discussing the use of "fighting words," the Court held that some "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." In the obscenity context, Chief Justice Warren wrote of "the right of the Nation and of the States to maintain a decent society. . ." versus "the right of individuals to express themselves freely." *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, Ch.J., dissenting); Justice Brennan in *Roth v. United States*, 354 U.S. 476, 484 (1957) and Chief Justice Burger in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 61 (1973), "implicitly accepted that a legislature could legitimately act . . . to protect 'the social interest in order and morality.'" *Paris Adult Theatre*, *id.*, citing *Chaplinsky*. The *Paris* Court went on to cite a statement of Justice Holmes, made in a different context:

> [T]he proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

413 U.S. at 61, n.11, quoting *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (Holmes, J., dissenting).

Even if interest in public morality—concern for the moral welfare of dancers and patrons—were the only reason for this statute to be applied to nude dancing, that would be sufficient.[3] Certainly legislatures and prosecutors are entitled to consider the effect viewing striptease dances might have on the moral behavior of patrons,[4] in-

[3] We agree with and join Judge Easterbrook's discussion of the majority's attempt to portray this statute as one aimed at nude dancing, rather than as a content-neutral public nudity statute. Nevertheless, because Indiana applies this statute to nude dancing, and that application bothers the majority, we shall examine reasons states and subdivisions of states desire to regulate or prohibit nude entertainment. We do this to emphasize that even if this statute were aimed specifically at nude dancing, the state's valid interest in preserving public morality justifies the statute.

[4] The majority notes that "[d]ance also has biblical roots." Majority op. at 9. While the biblical dancing cited was clearly not of the nude variety, we should point out that the Bible condemned as immoral the behavior Indiana sought to limit here. See Matthew 5:27-28. Fortunately we need only interpret the Constitution.

cluding the potential for damaging marriages and breaking up families by fueling the desire for adultery.[5] In *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), the plaintiff challenged Georgia's prohibition of sodomy in part because there was no basis for the law

> other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

But there is more here than a concern for the morals of patrons who merely view nude dancing. In *California v. LaRue*, 409 U.S. 109 (1972), the Supreme Court upheld a prohibition on nude dancing in bars based on the regulatory powers granted states by the Twenty-first Amendment.[6] Here in *Miller*, the district court reviewed a videotape of Darlene Miller dancing nude—no customers were present, no one was being "entertained." *LaRue* takes us out of the abstract and into the real world where valid reasons for restricting certain conduct become obvious. Chief Justice Rehnquist described in rather graphic fashion the state's reason for prohibiting nude dancing in bars:

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[5] See generally *Attorney General's Commission on Pornography Final Report*, Vol. I, at 767-1036 (1986) (discussing the impact of public sexual behavior on pornographic "models" and consumers of pornography, along with the connection between pornography, prostitution, and establishments offering nude dancing).

[6] This court's opinion should be unanimous at least with respect to appellant Miller's dancing at J.R.'s Kitty Kat Lounge. The majority acknowledges that the Indiana statute is not overbroad; this case only involves the specific dances of each appellant. Indiana without question can ban nude dancing in establishments that serve alcohol. Majority op. at 4. Therefore, this statute as *applied* to ban Miller's dancing in a bar that sells alcohol is not unconstitutional. See dissenting opinion of Judge Coffey at 68, n.8.

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.
>
> Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

409 U.S. at 111. Although Indiana does not compile a legislative history, it is entitled to rely on the experiences of other communities that have dealt with the problems associated with nude dancing. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986) (city of Renton was entitled to consider the evidence from other communities of the harmful effects of sexually oriented businesses when enacting its own zoning ordinance). Most communities and states that enact nude dancing regulations report problems similar to those described in *California v. LaRue*, along with other problems such as neighborhood blighting and decreased property values. See *Attorney General's Commission on Pornography Final Report*, Vol. I., at 385-389 (1986) (discussing the problems associated with sexually oriented businesses, including bars with live nude dancing). Judge Posner wonders whether the bar at issue in this case is in South Bend's red light district, and whether South Bend even has a red light district. Concurring op. at 39. The answer to both questions seems to be yes, but the record is not conclusive. The record does indicate that several establishments that challenged the public nudity statute are clustered in the same area on South Michigan Street. A cursory finger-walk through the Yellow Pages (not in the record) would probably disclose similar places along with "adult" bookstores and video parlors. Perhaps a more detailed record (such as

contained in *LaRue* or the Attorney General's report) would emphasize to us what the local people already know. But it should not matter. South Bend's experience cannot be unique; the sheer volume of legislation in this field makes that clear.[7] Indiana's decision to use its public nudity statute to prohibit public nude dancing in bars is justified.

The state has made a moral judgment about public nudity, and consistent with that decision seeks to apply that judgment to public nude dancing. The state has also made moral judgments about bullfighting, dogfighting, gambling and any number of other activities that probably involve some conception of entertainment and expression. If all of these activities are protected to a limited extent by the First Amendment,[8] this court's only justification for suppressing one and allowing the others must be that we agree with the state's decision to ban bullfighting, dogfighting and (some) gambling, but cannot understand why the state would want to prevent nude dancing. Nude dancing is not protected by a stated constitutional provision that a majority of people have subverted at the expense of a minority, requiring the petitioned court to intervene. Rather, this is a valid law which fulfills a perceived need. Determining the wisdom, need, or propriety of laws is the role of an elected legislature, not the federal judiciary. *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965).

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[7] Indeed, this court need only examine its own prior decisions to discover connections between nude dancing establishments and crime, especially prostitution. See *United States v. Marren*, 890 F.2d 924 (7th Cir. 1989); *United States v. Doerr*, 886 F.2d 944 (7th Cir. 1989); *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988).

[8] Judge Posner admits that bullfighting, although completely banned in every state, is as much "expressive entertainment" as nude dancing: "Bullfighting is forbidden not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value." Concurring op. at 33.

To summarize, the majority's decision is not compelled by any holding or dicta of the Supreme Court. Neither is it compelled by any reasonable interpretation of the First Amendment. Indiana's prohibition of public nudity can apply to nude dancing that contains no expressive activity. The district court found and counsel for plaintiffs admitted that the dancing at issue does not express anything. Even if nude dancing is considered inherently expressive, Indiana may regulate the nude conduct through its content-neutral statute, because the governmental interest in preventing public indecency and immorality substantially outweighs whatever limited First Amendment rights are implicated by a simple striptease performed for money in bars. The judgment of the district court should be affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 1990.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation; and GLEN THEATRE, INC., an Indiana Corporation, GAYLE SUTRO, and CARLA JOHNSON,	)	Appeal from the United States District Court for the Northern District of Indiana; South Bend Division.
Plaintiffs-Appellants,	)	
Nos. 88-3006 & 88-3244 v.	)	Nos. 85 C 598 & 85 C 353
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLEY HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P.	)	Allen Sharp, Chief Judge

BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,	)
Defendants-Appellees:	)

ORDER

A majority of judges in active service have voted to rehear this case *en banc*. Accordingly,

IT IS ORDERED that rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on October 19, 1989 be, and are hereby, VACATED. This case will be reheared *en banc* on January 31, 1990 at 10:00 AM.

[887 F.2d 826]

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-3006 & 88-3244

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation; and GLEN THEATRE, INC., an Indiana Corporation, GAYLE SUTRO, and CARLA JOHNSON,

Plaintiffs-Appellants,

v.

CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLEY HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
Nos. 85 C 598 & 85 C 353—**Allen Sharp,** *Chief Judge.*

ARGUED MAY 25, 1989—DECIDED OCTOBER 19, 1989

Before WOOD, JR., COFFEY, and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* These consolidated appeals present the narrow issue of whether non-obscene nude dancing, performed before an audience as entertainment, is

expressive activity and therefore entitled to protection, albeit limited protection, under the first amendment. For the reasons stated herein, we hold that it is.

I.

This matter is before us for the second time and has a somewhat complicated history, both procedurally and substantively. The facts of the cases are presented in detail in the district court's opinion on remand, *Glen Theatre v. Civil City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988), and in our opinion remanding the *Glen Theatre* matter, *Glen Theatre v. Pearson*, 802 F.2d 287 (7th Cir. 1987). Therefore, we will present a very abbreviated description of the parties and the underlying facts and devote our energy to explaining the pertinent substantive and procedural background.

In 1985, Appellants Glen Theatre, Gayle Sutro, and Carla Johnson filed an action in district court to enjoin the State of Indiana from enforcing its public indecency law against them for presenting nude and semi-nude dancing at an adult entertainment establishment. Sutro and Johnson are dancers at such an establishment owned by Glen Theatre. The statute, on its face, provides for a total ban on nudity in public places.[1] The district court granted the injunction, finding that the statute was facially overbroad.

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[1] I.C. 35-45-4-1 reads as follows:

I.C. 35-45-4-1. Public indecency.

(a) A person who knowingly or intentionally, in a public place:

(1) Engages in sexual intercourse;

(2) Engages in deviate sexual conduct;

(3) Appears in a state of nudity; or

(4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic areas, or buttocks with less than fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

On the first appeal to this court, we examined the Indiana Supreme Court's decision in *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), *appeals dismissed sub nom. Clark v. State*, 446 U.S. 931 (1979), and *Dove v. State*, 449 U.S. 806 (1980), in which the court had upheld the statute against an overbreadth attack. Essentially, the *Baysinger* court held that Indiana's public indecency statute could be applied to mere conduct but could not be constitutionally applied to expressive activity. Construing the statute to prohibit only non-expressive nudity, the Indiana Supreme Court held that the statute was not overbroad. The court went on, however, to hold that nude dancing of the barroom or striptease variety was mere conduct and thus could be prohibited under the statute.

In reviewing the *Glen Theater* case, we determined that the United States Supreme Court's dismissal of the appeals from *Baysinger* for want of a substantial federal question was binding precedent on the overbreadth issue. We found, however, that the jurisdictional statement presented to the Supreme Court did not include the issue of application, *i.e.*, *Baysinger*'s holding that barroom/striptease dancing is not expressive activity, only mere conduct. We therefore reversed the district court's overbreadth ruling as controlled by *Baysinger*, and, because the district court had not addressed the question of application, remanded the case for a determination of whether the statute could be constitutionally applied to plaintiffs' activity.

In *Glen Theater* we discussed the relevant case law to assist the district court on remand. While we recognized that the Supreme Court has not directly confronted the issue and, therefore, has not explicitly held that nude dancing is expressive activity protected by the first amendment, we reviewed the Supreme Court's decision in *Schad v. Mt. Ephraim*,[2] 452 U.S. 61 (1981). "Although the *Schad*

[2] In *Schad* the Supreme Court invalidated a zoning ordinance that prohibited all live entertainment. The defendants in *Schad* operated an adult bookstore that offered to its customers the opportunity to view a live nude dancer and were convicted of violating the zoning ordinance. The Court held that the ordinance, by restricting all forms of live entertainment, was overbroad and violated the first and fourteenth amendments. In so holding, the Court noted that "[e]ntertainment as well as political and ideological speech is protected by the First Amendment." The Court then discussed the implications of nudity in entertainment and stated: "Nor may an entertainment program be prohibited solely because it displays the nude human figure. . . . Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulations." *Glen Theatre*, 802 F.2d at 290 (citations omitted).

(Footnote continued on following page)

court did not decide the extent and scope of protections to be afforded nude dancing, it clearly held that the activity had roots in the First Amendment. Therefore, the language of the opinion certainly calls into question the Indiana Supreme Court's holding in *Baysinger* that nude dancing was merely conduct and as such was not entitled to First Amendment protection." *Glen Theatre*, 802 F.2d at 290 (citations omitted). To place the overbreadth issue in context, we continued:

> However, *Schad* does not disturb the *Baysinger* overbreadth holding. *Schad* is consistent with *Baysinger's* decision that nudity needs to be combined with some sort of expressive activity before it falls within First Amendment protection. "[N]udity alone does not place otherwise protected material outside the mantle of the First Amendment."

Id. (citations omitted). *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718-19 (1981) (Stevens, J., dissenting); *Young v. Arkansas*, 474 U.S. 1070, 1071-72 (1986), (White, J., dissenting from denial of certiorari) (recognizing the Court's "repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment" and urging an explicit holding to that effect); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (stating that "[a]lthough customary 'barroom' type of nude dancing may involve only the

[2] *continued*

barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.").

We further pointed out that several circuits have held that nude and semi-nude barroom dancing as well as other forms of nude entertainment are entitled to first amendment protection.

> For example, the Eleventh Circuit . . . citing *Schad* . . . stated, '[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before pay[ing] customers and not . . . casual viewers.' *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520, 1525 (1986). Earlier in *Krueger v. Pensacola*, 759 F.2d 851, 854 (1985), the Eleventh Circuit had recognized that topless dancing was a form of expression protected by the First Amendment. The *Krueger* court noted that the Supreme Court has consistently evaluated any potential artistic or communicative activity (including topless dancing) under First Amendment standards. *Id.* at 854 & n.4 . . . see also *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (allowing extensive time, place, and manner regulation of topless entertainment); *Avalon Cinema Corp. v. Thompson*, 658 F.2d 555 (8th Cir. 1981); *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976); *Chapin v. Southampton*, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978).

Glen Theatre, 802 F.2d at 290-91.

Having thus laid the groundwork for the district court, we remanded the case with instructions to "examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole the activity should be afforded First Amendment protection." On remand, the district court consolidated the *Glen Theatre* matter with the *Miller* action and a third pending case. The latter two suits were brought by plaintiffs seeking to present nude and semi-nude dancing at their lounges. Darlene Miller is a dancer at the "Kitty Kat" lounge.

After reviewing a videotape of the plaintiffs' proposed dancing,[3] the district court, apparently taking our instruction to require a determination as to the degree of expression embodied in a particular dance routine, held that because "these strip tease dances are not performed in any theatrical or dramatic context," the dancing was not expressive activity and therefore was without first amendment protection. The plaintiffs in *Glen Theatre* and *Miller* appealed.

II.

When a court grapples with a delicate and emotionally charged issue, sometimes, unavoidably, an unintended ambiguity may find its way into an opinion. A careful reading of the opinion, however, ordinarily will clarify any question. In this case, although we might have been more precise in our instruction on remand and substituted the words "activity they wish to engage in" for "dancing they wish to perform," on the whole we believe our guidelines were misread. As we explained in *Glen Theatre*, the case law points to the conclusion that non-obscene nude dancing as entertainment is a form of expression entitled to limited first amendment protection. Given the posture of the case, however, we thought it appropriate that the district court make the initial determination of whether the State of Indiana was, in fact, seeking to enforce its statute to prohibit nude dancing as entertainment, and thus limit plaintiffs expression. We did not intend for the district court to make a qualitative judgment as to the aesthetic appeal or artistic merit of a particular dance routine.

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[3] The State briefly and half-heartedly argues that the videotape portrayed only the *Miller* plaintiffs' dancing and not the *Glen Theatre* plaintiffs' proposed dancing. At oral argument, however, the State conceded that all of the dances at issue are non-obscene striptease dance routines.

We believe that the district court's construction of whether the statute's application violates the plaintiffs' free speech rights was clearly erroneous. It was established on remand (and conceded by the State at oral argument) that the plaintiffs wished to present non-obscene nude dancing of the barroom/striptease variety. As the Second Circuit has stated:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person [at the local pub].

Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975) (quoting *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)).[4] In substance, nude-dancing is still expression. We recognized in *Glen Theatre* what the Supreme Court made clear in *Schad*: " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." 452 U.S. at 66. Nor does the fact that a dance is sexual remove the mantle of protection. "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. Federal Communications Commission*, 109 S.Ct. 2829, 2836 (1989). Therefore, nude-dancing as expression falls within the protection of the first amendment.

Our reading of these precedents constrains us to conclude that the Supreme Court would not permit Indiana

[4] The State also argues that not all entertainment is expressive and pointedly offers as examples cock-fighting and bear-baiting. We need not address that issue, for the basis of our holding is that *dance* is expression. We have framed the issue in terms of "dance as entertainment" in order to narrowly and accurately represent the facts of the case and to distinguish dance as an art or entertainment form from such things as social dancing or, say, aerobic dance/exercise. We express no opinion as to the expressive content of those activities.

to apply its public nudity statute to the activity these plaintiffs wish to engage in. What we have in this case are plaintiffs who wish to present non-obscene nude dancing as expressive entertainment. As such, no matter how little artistic value may be found in such performances, it is entitled to limited protection under the first amendment. This is not to say, of course, that the State is powerless to regulate the presentation of nude dancing. On the contrary, the State has a great deal of power. A government may impose reasonable time, place, and manner restrictions on protected expression. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). Similarly, it may regulate the nonexpressive conduct for reasons unrelated to the suppression of speech. *United States v. O'Brien*, 391 U.S. 367 (1968). It may also regulate nude dancing under the power granted it by the Twenty First Amendment. *California v. LaRue*, 409 U.S. 109 (1972). And it may totally ban obscene nude dancing. *Sable Communications*, 109 S.Ct. at 2835.

The State has admitted that the dance involved in this case is non-obscene but it has not presented any legitimate grounds for defending the statute. Thus, the ban at issue here does not fall within any of those categories of legitimate legislation. If the State wishes to regulate non-obscene expressive activity, it may do so, but within the bounds of the first amendment.

III.

Accordingly, the judgment of the district court is REVERSED, and the case is remanded for the entry of orders enjoining the State from enforcing I.C. 35-45-4-1 against these plaintiffs to prohibit non-obscene nude dancing as entertainment.

[695 F. Supp. 414]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation; GAYLE ANN MARIE SUTRO; and CARLA JOHNSON,,

Plaintiffs

v.) Civil No. S 85-353

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants

* *

DARLENE MILLER; and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,

Plaintiffs

v.) Civil No. S 85-598

CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P.

BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants

* *

SANDY DIAMOND; LYNN JACOBS; 720 CORPORATION, an Indiana Corporation, and 726 CORPORATION, an Indiana Corporation,

Plaintiffs

v.) Civil No. S 85-722 (Consolidated)

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Defendants

* *

MEMORANDUM AND ORDER
[September 9, 1988]

This case is before the court on remand from the Seventh Circuit Court of Appeals. In a Memorandum and Order signed by this Judge on July 26, 1985, defendants were preliminarily enjoined from arresting or prosecuting or threatening to arrest or prosecute plaintiffs. On October 10, 1985, a permanent injunction was issued. The injunction was appealed and on

September 30, 1986, the Seventh Circuit, speaking through Chief Judge Cummings, reversed this court's order and remanded the matter. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986). This court consolidated the *Glen Theatre* case with *Miller v. City of South Bend*, Cause Number S 85-598, and *Diamond v. City of South Bend*, Cause Number S 85-722. A hearing was held in open court on January 11, 1988. At that time this Judge set deadlines for filing briefs and proposed findings of fact and conclusions of law by all parties. Those briefs have since been filed and oral argument was heard on July 15, 1988, at which time this court took the matter under advisement. It is now prepared to render its decision in this case.

I. Findings of Fact

This court adopts the findings of facts as set forth in its Memorandum and Order in the *Glen Theatre* action, which was dated July 26, 1985. The relevant portion of that Memorandum and Order is attached hereto as Appendix "A".

This court also adopts the statement of facts set forth by Judge Robert L. Miller, Jr. in his Memorandum and Order in the *Miller* case, Cause Number S 85-598, dated May 5, 1986. The relevant portion of that Memorandum and Order is attached hereto as Appendix "B".

Finally, this court adopts the fact findings as stated by Judge Miller in his Memorandum and Order in the *Diamond* case, Cause Number S 85-722, dated May 5, 1986. The relevant portion of that Memorandum and Order is attached hereto as Appendix "C".

II. Conclusions of Law

The concept of the "law of the case" has specific application here. An inferior court must apply the decision of the superior appellate court. *United States of America v. City of Chicago*, No. 87-1973, 87-2076, slip op. at 6 (7th Cir. August 3, 1988). The

decision of the Seventh Circuit Court of Appeals in this case has at least two salient features. First, it specifically cited with approval the decision of the Supreme Court of Indiana in *State of Indiana v. Baysinger*, 397 N.E.2d 580 (1979). Secondly, it reversed this court's decision which had been based on First Amendment considerations. The composite effect of the decision of the Court of Appeals in this case is to create narrow constraints for this court's present decisional process. The Seventh Circuit mandate, which was spelled out at the end of the opinion was instructive:

> The district court should examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole, the activity should be afforded First Amendment protection.

In the preceding paragraph of the opinion, the court said:

> Plaintiffs are free to pursue their argument in district court that the nude dancing they wish to perform is expressive activity protected by the First Amendment and outside the reach of the public nudity statute as construed by *Baysinger*.

As this court understands these words, the type of dancing performed by these particular plaintiffs should be scrutinized by this Judge, who must then decide whether such activity is protected under the First Amendment. The plaintiffs in Cause Numbers S 85-722 and S 85-598 submitted a videotape as evidence of the type of dancing they wish to perform.[1] Plaintiffs in Cause Number S 85-353 apparently also incorporated that video tape as evidence of the dancing they wanted to perform. *See* "Supplemental Brief of Plaintiffs Darlene Miller and Jr.'s Kitty Kat Lounge, Inc." at page 3 ("The parties have agreed to

[1] The fact that some of the dancers wish to perform in establishments that serve alcohol is irrelevant here. The statute in question applies to public nudity and does not include any reference to establishments which serve alcoholic beverages. If that were the case, the Twenty-first Amendment of the Constitution of the United States would come into play.

incorporate proof offered by them at the hearings of March 11, 1986 as part of the record of this case."). It should be noted at this point that plaintiffs' counsel conceded in open court on July 15, 1988, that the Glenn Theatre, formerly located at 500 West Chippewa Avenue, was very recently destroyed by fire. Therefore, the cause of action has become moot as to that plaintiff. *See, DeFunis v. Odegaard*, 416 U.S. 312 (1974).

This court has viewed the entire videotape which was entered into evidence. The tape consists of four separate performances. The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts. This court must determine whether such acts are protected by the First Amendment.

This court is writing on anything but a clean slate. Many courts in this state, and most other states, have addressed the subject of public nudity in a First Amendment context. Three basic premises are universally accepted. First, clearly all nudity is not obscene. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975). Second, nudity which is obscene is not protected. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 484-485 (1957); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985). Third, some forms of nude dancing are clearly protected. *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981) ("nude dancing is not without its First Amendment protections from official regulations.")[2] Apart from those premises, however, the decisions throughout the country, although not always entirely clear, have been moving in the general direction of finding particular instances of nude dancing constitutionally protected. *See, e.g., International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (Nude dancing constitutionally protected expression, at least if performed indoors before pay customers); *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) (Barroom nude dancing can be expressive activity entitled to First Amendment protection and nudity alone is not sufficient to make that dancing legally obscene); *Birkenshaw v. Haley*, 409 F.Supp. 13, 18 (E.D. Mich. 1974) (Not all forms of nude or semi-nude behavior are embodied with sufficient communicative content to warrant the protection of the First Amendment.). *See also*, Been, *Erhardt v. State: Nude Dancing Stripped of First Amendment Protection*, 19 Ind. L.Rev. 1 (1986), in which the author concludes that Indiana's Public Indecency Statute encroaches upon legitimate expression involving public nudity and cites this court's original opinion finding the statute unconstitutionally overbroad as support for his contention that "professional dancers may seek protection for their communication in a federal forum where the law may be more sensitively applied and where first amendment rights may be zealously guarded." *Id.* at 15.

This court is required to apply Indiana law to the facts of this case. It is also required to follow precedent set by the Seventh

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[2] Schad did not explicitly find that non-obscene nude dancing was always constitutionally protected nor has any Supreme Court of the United States case directly confronted the question. In 1986, Justice White, in his dissent to *Young v. Arkansas*, ____ U.S. ____, 106 S.Ct. 830, 832 (1986), in which the court denied certiorari, stated that he believed that it was time for the court to address the question due to the disagreement in the state courts over the reach of the First Amendment in this area. The Supreme Court of the United States has still not directly confronted this issue. It has simply acknowledged that nude dancing is entitled to some First Amendment protection. *Schad v. Mt. Ephriam*, 452 U.S. 61 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 410 U.S. 546 (1975); *California v. LaRue*, 409 U.S. 109 (1972).

Circuit and to follow the "law of the case."[3] The law in Indiana was set forth clearly in two Supreme Court of Indiana cases, *State of Indiana v. Baysinger*, 397 N.E.2d 580 (Ind. 1980) and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984). The *Erhardt* case involved the same statute with which this court is dealing, I.C. §35-45-4-1. Ruth Erhardt entered a contest to be named "Miss Erotica of Fort Wayne" which was held at the Cinema Blue Theatre on February 25, 1982. The contest included a dance competition at which Erhardt danced to two songs. During the first, she wore a short negligee and panties. For the second number, she stripped down to nothing but a g-string and scotch tape criss-crossed over her nipples. She was arrested for public indecency. *Erhardt v. State*, 463 N.E.2d 1121, 1122 (Ind.App. 4 Dist. 1984), *rev'd* 468 N.E.2d 224 (Ind. 1984). The Indiana appellate court held that the dancing was protected by the First Amendment and that Erhardt could not be convicted of public indecency under IC §35-45-4-1. The Supreme Court of Indiana reversed saying that the evidence brought Erhardt's conduct squarely within the prohibitions of the statute which was constitutional under *Baysinger*. In *Baysinger*, three cases were consolidated which all involved nude dancing or appearances in bars. The court found that the Indiana public indecency statute was constitutional in view of case law which restricted and defined the conduct to be prosecuted under the statute. *Baysinger*, 397 N.E.2d at 587. The statute, therefore, was not overbroad but was constitutional as a valid exercise of police powers of the state. *Id.* With regard to nude dancing, the court conceded that other jurisdictions had found similar statutes unconstitutional:

[3] The "law of the case" may not technically apply here because the Seventh Circuit considered only the situation in the *Glen Theatre* action which this court has found to be moot due to the destruction of the Glen Theatre several months ago (*see infra*). However, while the court recognizes this technical distinction, it feels constrained to follow the Seventh Circuit's mandates in ruling on the remaining cases which were consolidated with *Glen Theatre* after that case was remanded to this court.

> We recognize the existence of cases cited by the appellees to indicate that some courts have held that the regulation of nude dancing through public indecency statutes or ordinances, when such laws are not tied to the regulation of alcoholic beverages, may be unconstitutional. *See New York Topless Bar and Dancers Assoc. v. New York State Liquor Authority*, 91 Misc.2d 780, 398 N.Y.S.2d 637, 637 n. 2 (N.Y.Sup.Ct. 1977); *People v. Nixon*, 88 Misc.2d 913, 390 N.Y.S.2d 518 (Sup.Ct. 1976); *Lucifer's Gate, Inc. v. Town of Van Buren*, 88 Misc.2d 790, 373 N.Y.S.2d 304 (Sup.Ct. 1975). Other courts in other jurisdictions have held similar statutes to be overbroad, *Jamaica Inn, Inc. v. Daley*, 53 Ill.App.3d 257, 11 Ill.Dec. 28, 368 N.E.2d 589 (1977). Other courts have attempted to construe the term public place in public indecency laws to exclude places where persons willingly enter. *See Yauch v. State*, 109 Ariz. 576, 514 P.2d 709 (1973); *State v. Brooks*, 275 Or. 171, 550 P.2d 440 (1976). *Id.* at 585.

However, the Indiana Supreme Court decided otherwise:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that

they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context, to appear nude in public for money. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances. Under these facts the argument that Ind.Code §35-45-4-1 (Burns 1978) is overbroad must fail. Certainly the presumption of constitutionality with which each statute is clothed is not clearly overcome. We reverse the judgments of the lower courts, order the injunctions issued to be lifted, and declare Ind.Code §35-45-4-1 to be constitutional as a valid exercise of the police powers of the state.

Id. at 587. The Seventh Circuit, in reversing this court's decision finding the Indiana statute unconstitutionally overbroad, pointed out that *Baysinger* and other Indiana case law sufficiently narrowed the reach of the statute to those instances of public nudity in which conduct, and not expression was involved.[4] There is nothing left for this court to decide but

[1] The Seventh Circuit pointed out that the *Baysinger* appeal had been summarily dismissed by the Supreme Court of the United States in *Clark v. State*, 446 U.S. 931 (1980) and *Dove v. State*, 449 U.S. 806 (1980) for want of a substantial federal question. The court noted that the Supreme Court of the United States' summary dismissal is a ruling that the Indiana statute, as interpreted in *Baysinger*, is constitutional in the face of an overbreadth attack because a summary dismissal rejects only the specific challenges presented in the statement of jurisdiction filed with the Supreme Court of the United States and in *Baysinger*, those challenges raised the issue of overbreadth. Therefore, the Supreme Court of the United States rejected the overbreadth challenges. *Glen Theatre v. Pearson*, 802 F.2d 287, 288-289 (7th Cir. 1986).

whether the nudity in question is expressive activity protected by the First Amendment.[5]

The *Baysinger* court looked at two major factors to determine whether the nudity was expressive activity. First, it considered the context of the dance presentation. The fact that the dancing was not part of a play or dramatic performance was deemed highly significant. *California v. LaRue*, 409 U.S. 109 (1972) was distinguished:

> We read *LaRue* to caution against attempting to censor dramatic performances in theaters or in movies, which may be protected expression. As noted in *Crownover v. Musick*, (1973) 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497, *cert. den. sub. nom.*, *Owen v. Musick*, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974):
>
> > "A close reading of the *LaRue* opinion reveals that the only area of regulation involved in that case which the Supreme Court found 'within the limits of the constitutional protection of freedom of expression' was that of motion pictures and theatrical productions."
>
> *See also Gabriel v. Town of Old Orchard Beach*, 390 A.2d 1065 (Me. 1979); *People v. Karns*, 81 Misc.2d 186, 365 N.Y.S.2d 725 (Cty.Ct.Rochester, Monroe Co. 1975); *Kew v. Senter*, 416 F.Supp. 1101 (N.D.Tex. 1976).

Baysinger, 397 N.E.2d at 585.

[5] Whether the nude dancers perform in a "public place" as that term is used in the statute is not at issue here. There is no question, under Indiana law, that the businesses in question constitute public places. In *Baysinger*, the court reiterated its finding in *Peachy v. Boswell*, 240 Ind. 604, 167 N.E.2d 48 (1960), that a public place is "any place where the public is invited and are free to go upon special or implied invitation — a place available to all or a certain segment of the public." *Baysinger*, 397 N.E.2d at 583. Even a movie-viewing booth located in an adult bookstore which had a "glory hole" in one wall of the booth through which a defendant exposed his genitals was found to be a public place in *Thompson v. State*, 482 N.E.2d 1372 (Ind.App. 1985). *See also, Adams v. State*, 461 N.E.2d 740 (Ind.App. 1984), where the court found that private viewing booths with lockable doors with "in use" lights above the doors and which encircled a stage where nude dancers performed constituted a "public place."

The court also considered the fact that the dancers' claimed injury was economic in nature.[6] They complained that they made less money appearing scantily clad than they could make appearing nude. They did not claim that there was any pure speech involved in their appearances.

Unlike the *Baysinger* dancers, the dancers in this case have claimed that their First Amendment rights have been violated. They contend that their dancing is a form of expressive activity protected by the First Amendment. After viewing the proffered evidence, this court must conclude that in light of the Indiana Supreme Court decisions, the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States. These strip tease dances are not performed in any theatrical or dramatic context. Further, their conduct falls squarely within the prohibitions of Indiana's Public Indecency statute, which has been found constitutional.

This court cannot find any constitutionally protected expression in these performances, and must conclude that the dances are mere conduct. Judgment shall be entered in favor of the defendants. All costs assessed against the plaintiffs. IT IS SO ORDERED.

DATED: September 9, 1988

/s/ Allen Sharp
CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[6]The *Baysinger* court did not consider whether the dances might be "commercial speech" which may be protected under the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976). That argument has not been raised in the case now before this court. Therefore, it will not be considered. Other courts, however, have found that nude dancing is not commercial speech. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (1986).

APPENDIX "A"

I. FINDINGS OF FACT

Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings and live entertainment at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana called the Chippewa Bookstore. The live entertainment at the Chippewa Bookstore consists of nude and semi-nude performances and showings of the female body through glass panels. The customers would sit in a booth and insert coins in a timing mechanism that permitted them to observe the live nude and semi-nude dancers for a period of time. This live entertainment is offered to fee-paying consenting adults over the age of 18 and no accidental viewing by any non-consenting person of the live nude and semi-nude entertainment is possible. No alcoholic beverages are sold, consumed or allowed on the Chippewa Bookstore premises. Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live nude and semi-nude showings.

In a period of about two years from March 1983 to March 1985, there were approximately eleven arrests of individuals at the Chippewa Bookstore for violations of I.C. §35-45-4-1(a) for appearing in a state of nudity. All those who have been arrested have been prosecuted and at least five of those persons have been convicted of violating the Indiana public indecency statute and have unsuccessfully appealed their conviction to the Indiana Court of Appeals and Indiana Supreme Court. The latest arrests occurred on March 27, 1985 at which time two females were arrested by the South Bend Police Department and charged by the prosecuting attorney with violating I.C. §35-45-4-1. None of the plaintiffs in this case are the subject of criminal charges pertaining to the issues in this case.

As a result of the raids of March 27, 1985, the Chippewa

Bookstore has discontinued the showing of any live nude entertainment. Glen Theatre, Inc. had scheduled Gayle Ann Marie Sutro (Sutro) to perform a nude dance production throughout the summer and fall of 1985 in conjunction with a South Bend area showing of one of her motion picture films at the Chippewa Drive-In. Sutro is a professional actress, stunt woman and ecdysiast and has studied acting, dancing, speech and language. She has danced, modeled and acted professionally for more than fifteen years and is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild and AFTRA. In her affidavit, Sutra stated that her nude dances are appropriately choreographed and are an attempt to communicate as well as to entertain.

Timothy J. Corbett, a sergeant with the South Bend Police Department and stationed in the South Sector of South Bend where all arrests at Chippewa Bookstore have occurred, stated in his affidavit that no arrests have ever been made for nudity as part of a play or ballet.

APPENDIX "B"

II. FACTS

A. S85-598

Cause number S85-598 is a suit for preliminary and permanent injunction brought by Darlene Miller and JR's Kitty Kat Lounge, Inc. ("Kitty Kat") against the City of South Bend, the Indiana Alcoholic Beverage Commission, South Bend's police chief, the prosecuting attorney for the county in which South Bend is located, and Indiana's Attorney General. Ms. Miller and the Kitty Kat contend that IC 35-45-4-1(a)(3) deprives them of their First Amendment right to present nude entertainment.

At the hearing on the preliminary injunction, the plaintiffs presented the testimony of Ms. Miller and Arthur Ford, who is the sole stockholder of the Kitty Kat. Their testimony, which was unrebutted, established the following:

The Kitty Kat sells alcoholic beverages and presents "go-go" dancing. The Kitty Kat made approximately $51,000.00 in 1985. Mr. Ford wants to present nude dancing to his patrons, but the Kitty Kat currently presents no "totally nude dancing". The Kitty Kat does not, and nobody intends for it to, present plays, ballet or the works of Shakespeare.

The Kitty Kat's dancers are not paid an hourly wage; instead they work on commissions: they receive 100% commissions on the first $60.00 in drink sales during their performances, and Mr. Ford keeps a careful accounting of the amount received by each dancer. The length of their working hours depends upon the number of dancers present. Mr. Ford cannot compel the Kitty Kat dancers to dance nude, although he may terminate the contract of a dancer who refuses to do so.

On July 27, 1985, Mr. Ford read of the issuance in another case, see Part V-C, *infra*, of an injunction against enforcement of the public indecency statute, and decided to present some nude entertainment. Kitty Kat dancers danced nude until about 2:50 a.m., when South Bend police officers informed Mr. Ford that arrests would be made if the nude dancing continued. The nude dancing stopped; no arrests were made. The Kitty Kat has never been engaged in a criminal case, at least not since Mr. Ford purchased the business in 1981.

Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing". The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go", sometimes fast, sometimes slow. She dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so; at present, she wears "pasties" and a "g-string" when she dances, for fear of arrest. She danced nude on July 27, 1985 until the police arrived. Ms. Miller has no prior or pending criminal charges.

APPENDIX "C"

B. S85-722

Cause number S85-722 is a suit for preliminary and permanent injunctive relief brought by Sandy Diamond, Lynn Jacobs, 720 Corporation ("Ramona's Car Wash") and 726 Corporation ("Ace-Hi Lounge") against the same defendants as in cause number S85-598. These plaintiffs, too, contend that IC 35-45-4-1(a)(3) deprives them of their First Amendment right to present nude entertainment. They also appear to raise an allegation that the statute is overbroad.

At the hearing on the motion for preliminary injunction, the plaintiffs presented the testimony of Ms. Jacobs, Ms. Diamond and George Herring, who is secretary of Ramona's Car Wash and Ace-Hi Lounge and one of the corporations' two shareholders. Mr. Herring manages those establishments. Their testimony, which was unrebutted, established the following:

Ramona's Car Wash and Ace-Hi Lounge sell alcoholic beverages and present what Mr. Herring termed "exotic dancers". Ramona's Car Wash and Ace-Hi Lounge advertise alcohol and dancers; their wares are apparent to passers-by. Ramona's Car Wash and Ace-Hi Lounge hires "go-go" girls locally, and uses talent agencies to bring in dancers from other police to present "Vegas-style" acts. Ballet and Shakespeare plays are not presented at Ramona's Car Wash and Ace-Hi Lounge, but Mr. Herring noted that some of the dancers do comedy routines or a "little girl act".

Dancers at Ramona's Car Wash and Ace-Hi Lounge are not allowed to dance totally nude because the owners fear criminal prosecution. In July, the owners planned to present nude dancers in light of an injunction issued in an unrelated case, see Part V-C, *infra*, but South Bend police officers warned them not to do so. The owners of Ramona's Car Wash and Ace-Hi Lounge believe that presenting "totally nude" dancing would be good for business and bring in more customers. Mr. Herring conceded, however, that he has never worked in a tavern that

presented nude entertainment, and was unaware of any local drinking establishment that features nude dancers.

Ramona's Car Wash and Ace-Hi Lounge have been involved in an arrest for underage drinking, but never in arrests for violation of the public indecency statute.

Ms. Jacobs is among the dancers featured at Ace-Hi Lounge. She describes herself as a "go-go" dancer. Ms. Jacobs dances for fifteen to twenty minutes as a juke box plays four songs. She buys outfits to wear when she dances, but her act consists of removing the outfits. Her act features no choreography: she simply takes the stage and dances. Ms. Jacobs believes she entertains the patrons in the establishment: they come in to see her, they applaud, they buy her drinks in appreciation of her performance. Her pay depends upon the number of drinks purchased, and she must sell a certain number of drinks to be paid. In a good week, Ms. Jacobs earns $500.00 to $600.00; in a bad week, she makes $100.00 less.

Ms. Jacobs does not dance nude; Ace-Hi management has instructed her not to dance nude for fear of prosecution. She wants to dance nude to produce more money for herself and for Ace-Hi Lounge, and she will dance nude if the injunction is granted in this case.

Ms. Diamond has worked at Ramona's Car Wash intermittently since February, 1985. She describes herself as an "exotic dancer". Ms. Diamond has traveled as an "exotic dancer" for seven years, and spent the previous four years in the Academy of Ballet. She has worked as an "exotic dancer" in many places in the continental United States, Canada, Guam, Puerto Rico and Japan. She has acted as an extra in motion pictures and on the Hawaii Five-O television show.

Ms. Diamond does not dance nude at Ramona's Car Wash; management has ordered her not to for fear of prosecution. In her seven years as an "exotic dancer", this is the third place she has found in which she cannot dance nude. In her local performances, Ms. Diamond removes her clothing to reveal "pasties"

and a "g-string"; occasionally, avowedly for theatrical effect, she leaves her gloves on as well. Ms. Diamond dances in costumes designed for her acts; she dances to her own taped music. Her acts are designed to "create a fantasy in the minds" of her patrons. She perceives herself to be acting when she dances, and believes, based upon the applause she receives, that she entertains those who see her perform. She will dance nude if the injunction is granted.

Ramona's Car Wash hires Ms. Diamond through Universal Entertainment of Massachusetts. She earns a weekly salary of $600.00, plus 25% of all drinks after the first $600.00; the agency receives a ten percent commission. She sells in the neighborhood of $900.00 in drinks each week she works. Ms. Diamond conceded that she can make more money elsewhere, but she prefers to work close to her South Bend home. Her base salary is not necessarily increased when she dances nude; that salary depends upon her publicity, recent films, costumes, and other considerations. Ms. Diamond's contract with Ramona's Car Wash prohibits nude dancing, but the contract could, according to Ms. Diamond, be amended easily.

* *

MEMORANDUM AND ORDER
[ON MOTION TO ALTER OR AMEND JUDGMENT]
[October 21, 1988]

This court issued a Memorandum and Order which was the final disposition on the merits of the three above cause-numbered cases, on September 9, 1988. Judgment was entered on September 13, 1988. Plaintiffs Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson filed and served upon defendants' counsel a Motion to Alter or Amend Judgment presumably under Rules 52(b) and 59(e), Federal Rules of Civil Procedure (Fed.R.Civ.P.), on September 28, 1988.

Rule 59(e) requires that:

> "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 52 (e) has a similar time requirement:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

It is well settled that the ten-day period is mandatory under both sections and cannot be extended by the district court. *See, e.g., Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 (7th Cir. 1985); *Wort v. Vierling*, 778 F.2d 1233, 1234 (7th Cir. 1985); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 827 (7th Cir. 1984). It should also be pointed out that untimely motions under Rule 52(b) or Rule 59(e) do *not* extend the period for filing notice of appeal. *See, e.g., Marane*, 755 F.2d at 110; *Glass v. Seaboard Coast Line R. Co.*, 714 F.2d 1107, 1108 (11th Cir. 1983); *Biggs v. Roberts*, 213 F.2d 893 (7th Cir. 1954) (Untimely motion cannot toll the running of the time for appeal). Plaintiffs' motion is untimely under either Rule 59(e) or Rule 52(b). The ten-day limit ended on September 27, 1988, one day before the motion was served and filed as computed pursuant to Rule 6, Fed.R.Civ.P. Note that the additional three days provided by Rule 6(e) do not apply to judgments which are not the subject of "service", whether or not the mails were used to transmit the judgment from the clerk to a party. *Flint v. Howard*, 464 F.2d 1084, 1087 (1st Cir. 1972). Even if the motion were timely, it has no merit. Plaintiffs are simply attempting to present the same arguments one last time. Plaintiffs' Motion to Alter or Amend Judgment must be DENIED.

Although the greater part of plaintiffs' motion addresses the substantive issues of this case, at least one portion of the motion is mischaracterized as a Rule 59(e) motion because it concerns a factual error made by this court, rather than a legal error. This move to correct a factual mistake should and will be

considered a motion under Rule 60(b)(1).[1] The court stated in its opinion of September 13, 1988, that "plaintiffs' counsel conceded in open court on July 15, 1988, that the Glen Theatre, formerly located at 500 West Chippewa Avenue, was very recently destroyed by fire. Therefore, the cause of action has become moot as to that plaintiff." The court based this statement on the following exchange which occurred in open court on July 15, 1988, between this Judge and Mr. Robert C. Rosenfeld, attorney for defendants City of South Bend and Charles Hurley, Chief of Police:

> **Mr. Rosenfeld:** . . . There is only one thing in all fairness I need to bring to the court's attention that I found out by reading the paper last night.
>
> **The court:** You are not even in the Glen Theatre case. Yes, you are.
>
> **Mr. Rosenfeld:** Yeah, we are. Factually, Your Honor, there was a fire at Glen Theatre. I don't know what effect it has on this case.
>
> **The Court:** Why are you telling me about it then?
>
> **Mr. Rosenfeld:** Except Glen Theatre doesn't exist as a physical entity right now.
>
> **The Court:** Has that got something to do with this case?
>
> **Mr. Rosenfeld:** Only in the fact that an injunction matter . . .
>
> **The Court:** Are you trying to moot it out?
>
> **Mr. Rosenfeld:** I am not sure.
>
> **The Court:** You are in a United States District Court. Now you either got something important to say or you haven't. I read the paper too. I don't live in a vacuum. Does that have something to do with the issues in the case?
>
> **Mr. Rosenfeld:** Not the issues presented, Your Honor.
>
> **The Court:** Let's get on then.

[1] Rule 60. Relief from Judgment Or Order

(b) Mistakes; Inadvertence; Excusable neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such items as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) *mistake, inadvertence, surprise or excusable neglect.*

Plaintiffs never challenged that exchange because, as explained in the Motion to Alter and Amend, counsel thought it unnecessary to respond to a motion to dismiss on grounds of mootness which was never properly raised. The affidavit of Roger Judd, president of Glen Theatre, Inc., which was filed in support of the Motion to Alter or Amend states that the fire did not in fact destroy the entire business premises of the Glen Theatre which continues to operate its business. Based on that affidavit, this court now nullifies *only* that part of the opinion which found the cause moot as to the Glen Theatre. It should be emphasized that this action is being taken pursuant to Rule 60(b)(1) to correct a factual mistake that affects the substantive rights of the parties. This court has no choice but to deny an untimely Rule 59(e) motion. However, because part of that motion was mischaracterized and was, actually, a Rule 60(b)(1) motion, this court grants relief under Rule 60(b)(1) for a factual mistake. The finding of mootness is VACATED and the judgment shall therefore apply in full to the Glen Theatre, as well as the plaintiffs who perform there. IT IS SO ORDERED.

DATED: October 21, 1988

/s/ Allen Sharp
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

[802 F.2d 287]

IN THE

United States Court of Appeals

For the Seventh Circuit

No. 85-3029

GLEN THEATRE, INC., an Indiana Corp.;
GAYLE ANN MARIE SUTRO and CARLA JOHNSON,

Plaintiffs-Appellees,

v.

LINLEY E. PEARSON, Attorney General of Indiana,
and MICHAEL P. BARNES,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division.
No. 85 C 353—**Allen Sharp,** *Chief Judge.*

ARGUED APRIL 18, 1986 — DECIDED SEPTEMBER 30, 1986

BEFORE CUMMINGS, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and NOLAND, *Chief District Judge.**

CUMMINGS, *Chief Judge.* This appeal calls into question the validity of Indiana's public nudity statute, Indiana Code §35-45-4-1. The plaintiffs protest that the breadth of the statute chills their First Amendment right of free speech. The district

* The Honorable James E. Noland, Chief District Judge for the Southern District of Indiana, is sitting by designation.

court agreed and permanently enjoined defendants from enforcing the statute. Because the Indiana Supreme Court has interpreted the statute to protect First Amendment expression, we reverse and remand.

Statement of the Case and Facts

Plaintiffs filed suit seeking to enjoin the State of Indiana from enforcing its public indecency law[1] against them for nude entertainment. The plaintiffs include Glen Theatre, a business that wants to provide nude entertainment to its customers, and two performers, Gayle Ann Marie Sutro and Carla Johnson. On July 26, 1985, after finding the statute facially unconstitutional for overbreadth, the district court entered a preliminary injunction prohibiting the defendants from arresting and prosecuting the plaintiffs under Indiana Code §35-45-4-1(a)(3). On October 10, 1985, the district court entered a permanent injunction. The defendants appeal from the district court's order. We have jurisdiction under 28 U.S.C. §1292(a).

Plaintiff Glen Theatre is an Indiana corporation that owns an adult entertainment business called the Chippewa Bookstore. The Bookstore provides adult books and magazines, movie showings, and live entertainment. The live entertainment consists of nude and semi-nude performances through glass panels. By inserting coins into a timing mechanism the customers are permitted to observe the nude dancers. No alcoholic beverages are sold, consumed, or allowed on the Bookstore prem-

[1] Ind. Code §35-45-4-1 provides:

(a) A person who knowingly or intentionally, in a public place:
(1) Engages in sexual intercourse;
(2) Engages in deviate sexual conduct;
(3) Appears in a state of nudity; or
(4) Fondles the genitals of himself or another person;
commits public indecency, a class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

ises. Approximately eleven individuals have been arrested at the Bookstore for violations of Indiana Code §35-45-4-1(a)(3) (appearing in a state of nudity). Plaintiffs Gayle Ann Marie Sutro and Carla Johnson are both performers scheduled to dance nude at the Bookstore. These performances have been discontinued for fear of prosecution.

Defendants raise only one argument on appeal. They claim that the district court erred in ruling that Indiana's public indecency statute is constitutionally infirm as overbroad. Defendants argue that the Indiana Supreme Court adequately narrowed the statute through judicial construction. We agree with defendants and therefore reverse the permanent injunction order and remand for consideration whether the First Amendment permits plaintiffs' activities.

Discussion

Our analysis begins with *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), appeals dismissed *sub nom. Clark v. State*, 446 U.S. 931, and *Dove v. State*, 449 U.S. 806, which upheld the constitutionality of Indiana Code §35-45-4-1. Defendants first claim that the summary dismissals by the Supreme Court are binding precedent. Plaintiffs counter that the later Supreme Court decision of *Schad v. Mt. Ephraim*, 452 U.S. 61, reflects a subsequent change in the law under which we should review the *Baysinger* decision.

In *Hicks v. Miranda*, 422 U.S. 332, 343-345, the Supreme Court held that a dismissal "for want of a substantial federal question" is a decision on the merits. Lower courts are bound until subsequent Supreme Court decisions indicate otherwise. *Id.; Muench v. Israel*, 715 F.2d 1124, 1139 (7th Cir. 1983). Although it is clear that lower courts are bound by summary actions on the merits, "[a]scertaining the reach and content of summary actions may itself present issues of real substance." *Mandel v. Bradley*, 432 U.S. 173, 176 (quoting *Hicks*, 422 U.S. at 345 n. 14).

A dismissal for want of a substantial federal question is an affirmance of the judgment only, not the rationale of the opinion below. *Mandel*, 432 U.S. at 176. Such a summary dismissal rejects only the specific challenges presented in the statement of jurisdiction filed with the Supreme Court. Thus lower courts are prevented from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. *Id.* If the facts, issues, or law is different then there is reason not to follow the summary action. *Id.* at 180 ("In other words, after today, 'appropriate, but not necessarily conclusive, weight' is to be given this court's summary dispositions."). Thus if the jurisdictional statements in the *Baysinger* appeals raise the issue of overbreadth and it was necessarily decided, we must follow the Supreme Court's affirmance.

The *Baysinger* decision comprised three consolidated appeals from Indiana trial courts overturning the public nudity statute. The Indiana Supreme Court reached two issues in its opinion: (1) whether the term "public place" was vague and (2) whether the statute was overbroad. Because the case before us does not raise the vagueness argument, we need discuss only the overbreadth issue.

The *Baysinger* court held that nudity must be allowed when it is part of some larger form of expression that merits First Amendment protection. 397 N.E.2d at 587. So construed, it held that the statute was constitutional. The court went on to reject the argument that nude dancing is protected by the First Amendment, reasoning that the activity was simply conduct. *Id.*

Two of the consolidated cases were appealed separately to the Supreme Court of the United States. Both cases were summarily dismissed for want of a substantial federal question. *Clark v. State*, 446 U.S. 931, and *Dove v. State*, 449 U.S. 806. The jurisdictional statements in each case are as follows:

Clark v. State

1. Is that portion of the Indiana Code, Section

35-45-4-1, specifically (a)(3), which prohibits a female from appearing nude "in a public place" in conflict with the free speech clause of the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment for the reason that the statute is overbroad on its face?

2. Does the Appellant Sue Clark have the necessary standing to raise an overbreadth challenge to the constitutionality of Indiana Code 35-45-4-1(a)(3)?

Dove v. State

1. Is *Indiana Code*, Section 35-45-4-1(a)(3), which prohibits a female from appearing nude "in a public place" in conflict with the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment for the reason that the statute is overbroad on its face?

2. Is *Indiana Code*, Section 35-45-4-1(a)(3) & (b) in conflict with the First and Fourteenth Amendments of the Constitution of the United States in that said statute is vague?

3. Do the Appellants have the necessary standing to raise an overbreadth challenge to the constitutionality of *Indiana Code* 35-45-4-1(a)(3) and (b)?

Both statements of jurisdiction raise the issue of overbreadth. Thus the Supreme Court's summary dismissal is a ruling that the Indiana statute, as interpreted in *Baysinger*, is constitutional in the face of an overbreadth attack.[2] And as

[2] It is not always an easy task to figure out exactly what issues were declared by the Supreme Court to be without substance. However, by examining the law as it existed in 1980, we conclude that the overbreadth issue was necessarily decided by the Supreme Court despite additional standing arguments in the motions to dismiss. The Indiana Supreme Court in *Baysinger* questioned the defendants' standing to argue the First Amendment issue because they made money for dancing or appearing nude. 397 N.E.2d at 587. Countless First Amendment cases have involved persons who engaged in activities for monetary gain. See *Ginzburg v. United States*, 383 U.S. 463. In fact, most cases relating to the showing of

(footnote continued on following page)

construed by the Indiana Supreme Court the statute prohibits all nudity in public places unless coupled with other expressive activity protected by the First Amendment.

But plaintiffs argue that *Schad v. Mt. Ephraim*, 452 U.S. 61, decided after the *Baysinger* appeals were dismissed, has changed the applicable law. In *Schad* the Supreme Court invalidated a zoning ordinance that prohibited all live entertainment. The defendants in *Schad* operated an adult bookstore that offered to its customers the opportunity to view a live nude dancer and were convicted of violating the zoning ordinance. The Court held that the ordinance, by restricting all forms of live entertainment, was overbroad and violated the First and Fourteenth Amendments. *Id.* at 65-67. In so holding, the Court noted that "[e]ntertainment as well as political and ideological speech is protected by the First Amendment." *Id.* at 65. The Court then discussed the implications of nudity in entertainment and stated: "Nor may an entertainment program be prohibited solely because it displays the nude human figure. . . . Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulations." *Id.* at 66 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546; *California v. LaRue*, 409 U.S. 109).

Although the *Schad* Court did not decide the extent and scope of protections to be afforded nude dancing, see *New York St. Liquor Authority v. Bellanca*, 452 U.S. 714, 719 (Stevens, J., dissenting), it clearly held that the activity had roots in the First Amendment. 452 U.S. at 66. Therefore, the language of the opinion certainly calls into question the Indiana Supreme Court's holding in *Baysinger* that nude dancing was merely

[2] *continued*
films or live entertainment in the First Amendment context were brought by individuals seeking to make a profit. *E.g., Schad*, 452 U.S. 61; *Jenkins v. Georgia*, 418 U.S. 153; *Brockett v. Spokane Arcades*, 105 S. Ct. 2794; *Doran v. Salem Inn, Inc.*, 422 U.S. 922. By deductive reasoning, we conclude that the Supreme Court must have decided that both the vagueness and overbreadth issues were without substance.

conduct and as such was not entitled to First Amendment protection. However, *Schad* does not disturb the *Baysinger* overbreadth holding. *Schad* is consistent with *Baysinger's* decision that nudity needs to be combined with some sort of expressive activity before it falls within First Amendment protection. "[N]udity alone does not place otherwise protected material outside the mantle of the First Amendment." 452 U.S. at 66 (quoting *Jenkins v. Georgia*, 418 U.S. 153, 161). Because *Schad* leaves *Baysinger's* "nudity plus" formulation intact, its overbreadth holding as affirmed by the Supreme Court is still binding precedent. Thus under *Hicks* we are compelled to reverse the district court's departure from Supreme Court authority.

Plaintiffs raised an additional claim in district court *viz:* the application of the statute to prevent this type of nude entertainment is unconstitutional. The district court did not rule on plaintiffs' claim that Indiana's public indecency statute is unconstitutional in its application. Memorandum Opinion at 14 n.2. Neither of the jurisdictional statements in the *Baysinger* appeals to the Supreme Court of the United States raised an issue of the application of the otherwise valid statute to nude dancing. Plaintiffs are free to pursue their argument in district court that the nude dancing they wish to perform is expressive activity protected by the First Amendment and outside the reach of the public nudity statute as construed by *Baysinger.* Whether and to what extent the particular dancing activity of the plaintiffs is protected is still an open question. *Bellanca*, 452 U.S. at 719 (Stevens, J., dissenting); *Krueger v. Pensacola*, 759 F.2d 851, 854 n.4 (11th Cir. 1985). Several circuits have begun to reach issues involving statutes that restrict nude and semi-nude "bar-room" dancing and other forms of nude entertainment.

For example, the Eleventh Circuit recently addressed the constitutionality of an ordinance limiting nude dancing. *International Food & Beverage Systems v. Fort Lauderdale*, No. 85-5728, slip op. at 4545 (July 25, 1986). Citing *Schad*, the court

stated, "[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before pay customers and not . . . before casual viewers." Slip op. at 4549. Earlier in *Krueger v. Pensacola*, 759 F.2d 851, 854 (1985), the Eleventh Circuit had recognized that topless dancing was a form of expression protected by the First Amendment. The *Krueger* court noted that the Supreme Court has consistently evaluated any potential artistic or communicative activity (including topless dancing) under First Amendment standards. *Id.* at 854 & n.4 (citing *Schad*, 422 U.S. at 66; *Southeastern Promotions*, 420 U.S. at 557-558); see also *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (allowing extensive time, place, and manner regulation of topless entertainment): *Avalon Cinema Corp. v. Thompson*, 658 F.2d 555 (8th Cir. 1981): *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976); *Chapin v. Southampton*, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978). The district court should examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole, the activity should be afforded First Amendment protection. See *Erznoznik v. Jacksonville*, 422 U.S. 205, 211 n.7, *Schad*, 452 U.S. at 66.

Conclusion

For these reasons we reverse the permanent injunction and remand the case for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation, GAYLE ANN MARIE SUTRO, and CARLA JOHNSON,

Plaintiffs,

vs. Cause No. S85-353

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants.

ORDER

Upon motion of plaintiffs Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson and the court being duly advised in the premises, now finds that a permanent injunction should be issued in this case. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that all defendants in this case are hereby permanently enjoined from enforcing I.C. §35-45-4-1(a)(3), by way of arrest, prosecution or otherwise, against any live nude or semi-nude entertainment at the facility commonly known as the Chippewa Bookstore, 500 West Chippewa Avenue, South Bend, Indiana, as performed by plaintiff Gayle Ann Marie Sutro or plaintiff Carla Johnson. SO ORDERED.

/s/ Allen Sharp
CHIEF JUDGE, UNITED STATES DISTRICT COURT

Enter: October 10, 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation, GAYLE ANN MARIE SUTRO, and CARLA JOHNSON,

Plaintiffs,

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CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants.

MEMORANDUM AND ORDER

[July 26, 1985]

This case challenges the constitutionality of Indiana's public indecency statute, I.C. §35-45-4-1. In their complaint, the plaintiffs seek preliminary and permanent injunctive relief restraining the defendants and their agents, servants and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C. §35-45-4-1 in the factual context of this case. They are also seeking a declaratory judgment declaring I.C. §35-45-4-1 to be facially unconstitutional or in the alternative, that the application and threatened application of the statute to plaintiffs' proposed nude or semi-nude appearance at the Chippewa Bookstore is unconstitutional. The plaintiffs filed a Motion for Preliminary Injunction with a supporting brief. A hearing on the preliminary injunction was

held on July 1, 1985. All parties were given an opportunity to brief the issues and submit appropriate affidavits, which they have done. This memorandum and order constitutes the findings of fact and conclusions of law thereon as required by Rule 52 of the Federal Rules of Civil Procedure.

I.
FINDINGS OF FACT

Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings and live entertainment at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana called the Chippewa Bookstore. The live entertainment at the Chippewa Bookstore consists of nude and semi-nude performances and showings of the female body through glass panels. The customers would sit in a booth and insert coins in a timing mechanism that permitted them to observe the live nude and semi-nude dancers for a period of time. This live entertainment is offered to fee-paying consenting adults over the age of 18 and no accidental viewing by any non-consenting person of the live nude and semi-nude entertainment is possible. No alcoholic beverages are sold, consumed or allowed on the Chippewa Bookstore premises. Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live nude and semi-nude showings.

In a period of about two years from March 1983 to March 1985, there were approximately eleven arrests of individuals at the Chippewa Bookstore for violations of I.C. §35-45-4-1(a) for appearing in a state of nudity. All those who have been arrested have been prosecuted and at least five of those persons have been convicted of violating the Indiana public indecency statute and have unsuccessfully appealed their conviction to the Indiana Court of Appeals and Indiana Supreme Court. The latest arrests occurred on March 27, 1985 at which time two females were arrested by the South Bend Police Department

and charged by the prosecuting attorney with violating I.C. §35-45-4-1. None of the plaintiffs in this case are the subject of criminal charges pertaining to the issues in this case.

As a result of the raids of March 27, 1985, the Chippewa Bookstore has discontinued the showing of any live nude entertainment. Glen Theatre, Inc. had scheduled Gayle Ann Marie Sutro (Sutro) to perform a nude dance production throughout the summer and fall of 1985 in conjunction with a South Bend area showing of one of her motion picture films at the Chippewa Drive-In. Sutro is a professional actress, stunt woman and ecdysiast and has studied acting, dancing, speech and language. She has danced, modeled and acted professionally for more than fifteen years and is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild and AFTRA. In her affidavit, Sutra stated that her nude dances are appropriately choreographed and are an attempt to communicate as well as to entertain.

Timothy J. Corbett, a sergeant with the South Bend Police Department and stationed in the South Sector of South Bend where all arrests at Chippewa Bookstore have occurred, stated in his affidavit that no arrests have ever been made for nudity as part of a play or ballet.

II.
CONCLUSIONS OF LAW

A. JURISDICTION, STANDING AND ABSTENTION

This court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §1343(a)(3) and venue is proper under 28 U.S.C. §1391(b). The plaintiffs have standing to challenge the constitutionality of the Indiana public indecency statute. *See Flast v. Cohen*, 392 U.S. 83 (1968). They do not need to expose themselves to actual prosecution to present a justiciable controversy — the fear of prosecution, if reasonable is sufficient. *See Steffel v. Thompson*, 415 U.S. 452 (1974) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The number

of arrests and prosecutions, including those resulting from the raid on March 17, 1985, of individuals at the Chippewa Bookstore for violations of I.C. §35-45-4-1 is a sufficient basis for a reasonable fear of prosecution to confer standing. Further, there are no grounds for this court to abstain from considering this case. None of the plaintiffs in this action are the subject of pending criminal prosecutions so abstention is not appropriate under the abstention theory described in *Younger v. Harris*, 401 U.S. 37 (1971). *See Doran v. Salem Inn., Inc.*, 422 U.S. 922 (1975). Nor do the facts of this case require abstention under the abstention theories described in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) or *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976). Accordingly, this court must proceed to determine the merits of plaintiffs' request for preliminary injunctive relief.

B. PRELIMINARY INJUNCTION

The issuance of a preliminary injunction is an extraordinary remedy and involves the exercise of a far reaching power. Therefore, it should not be used except in a case clearly warranting it and will not be available unless the plaintiffs carry their burden of persuasion as to all the prerequisites. *See., e.g., Godinez v. Lane*, 733 F. 2d 1250, 1257 (7th Cir. 1984); *Shaffer v. Globe Protection, Inc.*, 721 F. 2d 1121, 1123 (7th Cir. 1983). To be entitled to preliminary injunctive relief, the plaintiffs must establish that (1) they have no adequate remedy at law or will be irreparably harmed if the preliminary injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the preliminary injunction may inflict upon the defendants; (3) the plaintiffs have a reasonable likelihood of success on the merits; and (4) the granting of the preliminary injunction will not disserve the public interest. *See, e.g., Palmer v. City of Chicago*, 755 F. 2d 560, 576 (7th Cir. 1985); *Roland Machine Co. v. Dresser Industries, Inc.*, 49 F.2d 380, 383 (7th Cir. 1984); *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F. 2d 1136, 1138-39 (7th Cir. 1984). In considering each of these four factors, the court must weigh carefully the

interests of both sides. *Palmer v. City of Chicago*, 755 F. 2d at 577; *see Doran v. Salem Inn Inc.*, 422 U.S. 922, 931 (1975).

1. Likelihood of Success on Merits

The Indiana public indecency statute provides in pertinent part as follows:

> (a) A person who knowingly or intentionally, in a public place:
>
> * * *
>
> (3) appears in a state of nudity;
>
> * * *
>
> commits public indecency, a Class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.
>
> * * *

I.C. §35-45-4-1.[1] The plaintiffs in this case allege that this statute is unconstitutional on its face because it is overbroad and infringes upon their rights and the rights of others under the First Amendment of the Constitution of the United

[1] The plaintiffs in this case are challenging the constitutionality of I.C. §35-45-4-1 in its entirety. Counsel for plaintiffs admitted at the hearing on the preliminary injunction that the conduct described in subsections (a)(1) and (2) were not involved in this case and that he was uncertain with respect to the conduct described in subsection (a)(4). There is no reference in this case to subsection (c) of the statute. Accordingly, the main thrust of plaintiffs' challenge is aimed at I.C. §35-45-4-1(a)(3) and the court will focus on that subsection for purposes of the preliminary injunction. At such time as the court is required to rule on the merits of this case, its opinion will comport with the applicable law on the issue of invalidation and severability. *See Brockett v. Spokane Arcades, Inc.*, 53 U.S.L.W. 4793 (S. Ct. June 18, 1985).

States.[2] The defendants maintain that the statute is facially directed only to conduct not expression, and has been limited by Indiana's court to exclude application to protected expression and can therefore withstand a constitutional attack.

A demonstrably overbroad statute may deter the legitimate exercise of First Amendment rights and when a plaintiff's claim is rooted in those rights, he is entitled to rely upon the impact of the statute on the expressive activities of others as well as his own in challenging a statute on overbreadth grounds. *see, e.g., Schad v. Mount Ephram*, 452 U.S. 61, 66 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). However, a court must proceed with caution and restraint when considering a facial challenge to a statute so as to not unnecessarily interfere with a state's laws. In accommodating these competing interests, a court should not deem a state statute facially invalid unless it is not readily subject to a narrowing construction by the state courts and its deterrent effect on legitimate expression is both real and substantial. *Ergnoznik v. City of Jacksonville*, 422 U.S. at 216; *see Dombroski v. Pfister*, 380 U.S. 479, 471 (1965); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1975); *Coates v. Cincinnati*, 402 U.S. 611 (1972).

The plain language of Indiana's public indecency statute clearly indicates its applicability to all nude appearances in a public place, at any time, in any manner, for any purpose. It is not limited to nude dancing, the activity in question in this case, nor is it limited by or in any way connected to obscene nudity.[3] Rather, it imposes sanctions on all individuals who appear nude in any public place without any limitations.

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[2] The plaintiffs also allege that the application of the statute to their conduct is unconstitutional. Since this court finds a likelihood of success on plaintiffs' claim of facial unconstitutionality, it will not address this claim for purposes of the preliminary injunction.

[3] This case is only addressed to non-obscene nude and semi-nude dancing. No issue has been raised with respect to obscenity and I.C. §35-30-10.101 et seq.

Nudity alone does not place otherwise protected material outside the guarantee of the First Amendment. *Schad v. Mount Ephram*, 452 U.S. 61, 66 (1981); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-13 (1975). Thus, an entertainment program may not be prohibited solely because it displays the nude human figure. "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Mount Ephram*, 452 U.S. at 65; *see Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952); *Schat v. United States*, 398 U.S. 58 (1970); *Jenkins v. Georgia, supra; Southeastern Promotions, Ltd. v. Conrad, supra; Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Furthermore, nude dancing is not without its first Amendment protections from official regulation. *Doran v. Salem Inn, Inc., supra; Southeastern Promotions, Ltd. v. Conrad, supra; California v. LaRue*, 409 U.S. 109 (1972).

The broad language of I.C. §35-45-4-1 clearly may have a real and substantial determent effect on legitimate expression. By its terms, it empowers law enforcement officials to arrest and prosecute a nude woman dancer or actress in a professional stage production, a model posing nude for art classes at a university, or a nude woman engaged in a public meeting the purpose of which is to educate and encourage infant breast feeding or self-examination for breast cancer. These activities are afforded the broadest First Amendment protection but may be made illegal under this statute. Likewise, the statute is not readily subject to a narrowing construction by the state courts in a proper exercise of their judicial power. In *State v. Baysinger*, ____ Ind. ____ 397 N.E. 2d 580 (1980), the Indiana Supreme Court addressed the constitutionality of I.C. §35-45-4-1 and found it constitutional. In its opinion, the court stated:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is in the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ides is involved.

397 N.E. 2d at 587. This language indicates that the Indiana Supreme Court recognizes that public nudity, at least in some circumstances, is constitutionally protected. The opinion appears to limit that protection to instances when the communication of ideas is involved in a larger form of expression but does not identify, describe or articulate what such activity encompasses. Rather, it merely found that appearing nude or dancing in the nude in bars was conduct and not entitled to protection. The opinion of the Supreme Court of the United States in *Schad v. Mount Ephram*, decided subsequently to *State v. Baysinger*, indicates that entertainment, including, non-obscene nude dancing, is entitled to some First Amendment protection. Further, the opinions of the Indiana courts subsequent to *State v. Baysinger* have not narrowed the construction of I.C. §35-45-4-1. *See Erhardt v. State*, ____ Ind. ____, 468 N.E. 2d 224 (1984); *Adams v. State*, ____ Ind. App. ____, 461 N.E. 2d 740 (1984). Accordingly, this court finds that plaintiffs have shown that they have a reasonable likelihood of success on the merits of their claim that I.C. §35-45-4-1(a)(3) is unconstitutional.

2. **Irreparable Harm/Adequate Remedy at Law**

The second factor plaintiffs must establish to be entitled to injunctive relief is that they have no adequate remedy at law or will be irreparably harmed if the injunction does not issue. The Supreme Court of the United States has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 374 (1976). Further, the chilling effect on a plaintiff's First Amendment rights from the threat of sanctions even without the actual imposition of sanctions raises a presumption of deprivation of First Amendment rights which fulfills the required showing of irreparable harm. *O'Brien v. Town of Caledonia*, 748 F. 2d 403, 409 (7th Cir. 1984); *Schnell v. Chicago*, 407 F. 2d 1084, 1086 (7th Cir. 1969); *see N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Citizens for A Better Environment v. City of Park Ridge*, 567 F. 2d 689, 691 (7th Cir. 1975).

In this case, the threat of arrest and prosecution for violating I.C. §35-45-4-1 may have had a chilling effect on plaintiffs' First Amendment rights. Live nude dancing has ceased at the Chippewa Bookstore, including the scheduled performance of Gayle Ann Marie Sutro, because of the fear of prosecution. Accordingly, the plaintiffs have shown irreparable harm.

3. **Balance of Harm**

The third factor, balance of harm, requires consideration of the defendants' interest in enforcing the statute. The legislative intent in prohibiting public indecency is to protect a non-consenting viewer from being exposed to a spectacle he or she may find repugant. *See Lasko v. State*, ____ Ind. App. ____, 409 N.E. 2d 1124, 1128 (1980). In the factual context of this case, the possibility of a non-consenting individual observing the nude dancing at Chippewa Bookstore is extremely remote. The nude dancing takes place in a fully enclosed opaque building and can be observed only by entering the mini-booths, and depositing money in a timing mechanism. The legislative intent would therefore not be undermined nor ignored by an injunction restraining arrest and prosecution of individuals under I.C. §35-45-4-1(a)(3) in the factual context of this case. Further, in light of the probable unconstitutional overbreadth of I.C. §35-45-4-1(a)(3), it would not greatly harm the defendants to be restrained from enforcing that specific provision in the factual context of this case. On the other hand, the chilling of plaintiffs' First Amendment rights is causing irreparable harm. The balance of harm favors the plaintiffs.

4. Public Interest

In the context of a First Amendment case, some consideration of this factor is implicit in addressing the likelihood of success on the merit. The public has a strong interest in the vindication of an individual's constitutional rights. Furthermore, as indicated in the preceding section of this opinion, the intent of the legislature in enacting the public indecency statute would not be undermined by enjoining the defendants from enforcing I.C. §35-45-4-1(a)(3) in the limited factual context of this case. Accordingly, the plaintiffs have made requisite showing of this factor.

III.
ORDER

For the foregoing reasons, plaintiffs' Motion for a Preliminary Injunction is GRANTED. The defendants are hereby enjoined until further order of this court from enforcing I.C. §35-45-4-1(a)(3), by way of arrest, prosecution or otherwise, against any live nude or semi-nude entertainment at the Chippewa Bookstore as performed by plaintiff Gayle Ann Marie Sutro or plaintiff Carla Johnson. SO ORDERED.

Enter July 26, 1985.

/s/ Allen Sharp
CHIEF JUDGE, UNITED
STATES DISTRICT
COURT